

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

JAMES B. SMITH, F. C. MILLS and E. H.
MAYER,

Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME II.
(Pages 321 to 736, Inclusive.)

Upon Writ of Error to the United States District Court of the
Northern District of California, First Division.

Filed

JUL 1 - 1915

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

JAMES B. SMITH, F. C. MILLS and E. H.
MAYER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME II.

(Pages 321 to 736, Inclusive.)

Upon Writ of Error to the United States District Court of the
Northern District of California, First Division.

(Testimony of W. H. Tidwell.)

Q. That is correct, is it not?

A. The bunker, or barge, or wherever it was placed.

Q. In other words, these day-books would also show the various place or places into which this coal would be placed, thus discharged from these ships or vessels? A. That is true.

Q. And that system was pursued each day until the cargo was entirely discharged? A. Yes, sir.

Q. And the entries if any were kept by the defendant Mills as to what ultimately was done with that coal or with that part of the cargo which was discharged into the compartments or pockets of the offshore bunker?

A. On the same page, same date, appears the name of the barge [284—230] "Ludlow" with some other letters which I do not understand the meaning of. And under the name of the "Terge Viking," which was an imported vessel, Voyage 7, I believe it is—she received 607 tons, 1100 lbs.; on account of the steamer "Titania," 939 tons, 440 lbs. Account of offshore bunker, 100 tons, 290 lbs., making the total amount received into the barge of 1646 tons, 1830 lbs. "Ventura," 199 tons, 1556 lbs. The "Sesostris," 150 tons, 848 lbs. The "Cambrian King," 700 tons, 1147 lbs. The steamship "Siberia," 662 tons, 940 lbs., a total of 1713 tons, 11 lbs., or over 66 tons, 421 lbs.

Q. In other words, that record upon its face shows that there was discharged from this barge some 66 tons of coal more than she took on.

(Testimony of W. H. Tidwell.)

A. More than she had on board, yes.

Q. More than she had on board? A. Yes.

Q. It is a fact, is it not, Mr. Tidwell, that in those books every pound of coal that finds its way into the barge is traced and found to be discharged?

A. Yes.

Q. As well as some 66 tons more?

A. Every pound that went into the barge is shown by the record. If it was taken from the yard, as I can find an instance here where coal was taken from the yard and placed into the barge—there does not seem to be one at the present time, but it will show the amount taken from the yard or any other place, both tons and pounds, tracing it down to 40 or 100 pounds.

Q. Now, I notice that you said a moment ago or that you indicated a few minutes ago that the number of the voyage of a particular boat was designated in that book. A. Yes.

Q. Do you recognize to what those figures relate?

A. The number of the voyage of the ship.

Q. The number of the voyage of the ship; and the number of [285—231] the voyage of the ship is indicated opposite the ship; isn't that true, in that book? A. Yes.

Q. So as to show upon what particular voyage the coal was discharged, which finally found its way into the barge; is that correct? A. Yes.

Q. Now, as I understand your testimony, Mr. Tidwell, if 5,000 tons of foreign coal were taken off a given ship, in this book is shown the quantity of coal

(Testimony of W. H. Tidwell.)

taken out of that boat each day, and the various points to which that coal would be distributed; is that correct? A. That is true.

Q. And that would follow along each day until the entire cargo of this imported coal would have been discharged from the ship.

A. That is true, and it would either show a shortage or an overage, as the case might be.

Q. In this book is also set down, so far as the importation of coal is concerned the invoice or bill of lading weight; is that correct?

A. It shows—no, it shows the amount which was discharged each day, and it ends with a statement either short or over, as I remember.

Q. And the shortage or overage is the difference between the out-turn weight and the invoice or bill of lading weight; is that correct? A. That is true.

Q. In other words, if the amount of coal discharged from the ship as shown by this book is 1,000 tons in excess of the invoice or bill of lading weight, the entry that is made in this book is over so many tons; is that correct?

A. Over 1000 tons or short 500 tons, as the case may be.

Q. If on the other hand the out-turn weight is less than the bill of lading or invoice weight, this book shows shortage so many tons or under so many tons?

A. That is true. [286—232]

Q. Now, then, this book shows also, does it not, Mr. Tidwell, the amount of foreign coal or imported coal laden from time to time in these barges?

(Testimony of W. H. Tidwell.)

A. It does.

Q. And also shows the coal taken out of these barges and placed upon other vessels.

A. It does.

Q. Including coal laden upon American registered vessels foreign bound for fuel purposes, upon which subsequently drawback claims were made; is that true? A. That is true.

Q. Now, I notice that in this book, so far as the discharge of barges is concerned appears quite frequently the words "over so many tons"; will you describe what is meant by entries similar in kind to that made in this book so far as the barges are concerned?

A. It refers to the amount which has been checked out of the barge more than went in it. For instance, to illustrate it, if a barge received 1000 tons of coal and they took out 1100 tons of coal, they would put down under the amount "100 tons over," or showing the difference between the amount that entered the barge and the amount which was subsequently removed.

Q. Now, let me take a concrete case for the purpose of illustration: If a vessel is being discharged containing imported coal and 1,000 tons of this coal is deposited into the compartments of the offshore bunker, this book would show that fact, would it not? A. Being discharged from a vessel.

Q. Yes. A. Yes.

Q. And would show that 1000 tons of that imported coal was finally deposited in the compart-

(Testimony of W. H. Tidwell.)

ments of the offshore bunker; that is true, is it not?

A. That is true.

Q. Now, then, if it was desired to place that coal upon an American registered vessel foreign bound, the 1000 tons of [287—233] coal would be discharged from the offshore bunker into the barge and this book would record that fact too, would it not?

A. It would.

Q. Now, the book would also—

A. (Intg.) Let me get the full significance of that question. You mean that book would show that coal was taken from the offshore bunker into the barge?

Q. Yes. A. Yes.

Q. And using the 1000 tons for the purpose of illustration, if there were 1000 tons deposited in that offshore bunker and the barge took that 1000 tons for the purpose of coaling some other vessel with it, this book would record that fact? A. It would.

Mr. STANLEY MOORE.—It would not record the fact that it had taken the 1000 tons that came from that vessel?

Mr. ROCHE.—Certainly.

Mr. STANLEY MOORE.—Ask the witness the question.

Mr. ROCHE.—Q. It would record the fact, would it not, that the 1000 tons in the offshore bunker would be laden from that offshore bunker into the barge? A. Into the barge.

The COURT.—I am assuming we are dealing only with 1000 tons of coal in the offshore bunker and

(Testimony of W. H. Tidwell.)

there has been nothing more put there.

Mr. MOORE.—Yes, that was the point of my objection. It appeared to me that he was trying to convey the impression to the jury that the book would show that 1000 tons had gone into the barge, which is not the fact.

The WITNESS.—If I am permitted to explain that, I think that I can, in the due course of time the Western Fuel Company would make an affidavit to the fact that that coal did come off a particular vessel and claim a drawback on it. [288—234]

Mr. MOORE.—We are talking about these books, now, Mr. Tidwell, and your testimony is supposed to be confined to that. We will come to this other matter further on in the testimony.

Mr. TIDWELL.—I was merely answering your question.

Mr. MOORE.—I was talking about the book and just trying to satisfy the jury, because I think a mistaken inference might arise from your testimony. You don't mean to testify that if 1000 tons came off a vessel into the offshore bunkers and that 1000 tons subsequently was loaded into a barge, that that book would show it was that 1000 tons. I think that your testimony was creating that impression with respect to that book.

* * * * *

Mr. ROCHE.—Q. It is a fact, is it not, for every pound of coal that this book shows was deposited from time to time in the offshore bunker, the book itself shows the particular boat from which that coal

(Testimony of W. H. Tidwell.)

was discharged; is that correct? A. Yes.

Q. In other words, if there was no coal at all in the offshore bunker, and 1000 tons of coal was taken off a particular boat and deposited in the offshore bunker this book would show the name of the boat from which that coal was discharged, would it not?

A. Yes, and the day on which it was placed there.

Q. And likewise the date upon which it was discharged from a particular boat? A. Yes.

Q. Now, using the 1000 tons still for the purpose of illustration, the weight of the coal or rather—I will withdraw that question and put it in this form: If 1000 tons of coal is [289—235] shown by this book to have been taken out of the offshore bunker and laden upon a barge, that 1000 tons represents the out-turn weight, does it not?

A. The out-turn weight of what?

Q. The out-turn weight of the coal discharged from the boat, from the importing vessel.

A. From that ship, yes.

Mr. STANLEY MOORE.—From the boat.

Mr. ROCHE.—Q. From the importing boat or boats, as the case may be; and upon that weight it is that duties are paid the United States Government.

A. That is true.

Q. And it is upon that weight that the duty was in fact paid to the United States Government; is that correct? A. That is so.

Q. Now, then, that 1000 tons would be carried by the barge over to one vessel, in the event that the entire 1000 tons was to be placed upon one vessel; is

(Testimony of W. H. Tidwell.)

that correct? A. Yes.

Q. And if that 1000 tons was being laden upon an American registered vessel, foreign bound, the weight of the coal at the point of discharge from the barge into the vessel would indicate the weight upon which the drawback claim would be based; isn't that true?

A. That is true. That amount of coal discharged from the barge even though it would be 1100 tons, to continue the illustration, would be sent by Mr. Mills to the office of the Western Fuel Company and we will say the steamship "Manchuria" would be charged with that amount and in due course of time the Pacific Mail Steamship would claim a drawback.

Mr. McCUTCHEN.—Q. Is that all from this book? Is that in explanation of this book, all of it?

Mr. ROCHE.—It is an explanation, although it all does not appear in the book. In other words, a drawback of [290—236] course does not appear in this book.

Q. Let me ask you this question, Mr. Tidwell. In a case such as that, assuming that the 1000 tons of coal when discharged into the American registered vessel, foreign bound, amounted to 1100 tons, the drawback claim would be based upon 1100 tons, and the duty would be refunded by the United States Government upon 1100 tons; is that not correct?

A. That is true.

Q. And it is also a fact, is it not, that in practically 99 per cent of the cases instances in this day-book kept by the defendant Mills, so far as the barges were concerned, there was always an overage?

(Testimony of W. H. Tidwell.)

A. Practically in every instance; there were a few shortages through the six or seven years.

Q. Let me ask you this question too;—a considerable quantity of this coal discharged first to the offshore bunker or into the compartments of the offshore bunker and afterwards laden upon these barges found its way into United States transports?

A. It did.

Q. That is correct, is it not?

A. That is, according to the records.

Q. According to the records? A. Yes.

Q. Now, have you compared the weight of the coal as that coal was weighed from the barge into the United States transports with the weight of the coal as the coal was discharged from the offshore bunker into the barge?

A. In other words, have I compared the weights checked into the transports by the amount which the barge had received? A. Yes.

Q. Do those records show that the weight of the coal deposited in the transport exceeded the weight of the coal as it was [291—237] checked into the barge? A. In almost every instance.

Q. An overage, is that correct?

A. An overage, yes.

Q. Is the same true with reference to some other boats owned by the United States and which were coaled by the Western Fuel Company from time to time? A. Revenue cutters, yes.

Q. Revenue cutters? A. Yes.

Q. It is a fact, is it not, Mr. Tidwell, that all of

(Testimony of W. H. Tidwell.)

these boats would ordinarily be coaled by means of these barges? A. Yes.

Q. In other words, the coal would first be laden upon the barge and afterwards from the barge discharged into the vessel? A. Yes.

* * * * * * * * * * *

Mr. ROCHE.—Q. Of course, you have examined, have you not, these claims made from time to time based upon affidavits of the defendants, James B. Smith and other officials of the Western Fuel Company upon which the United States Government paid back some of these import duties? A. I have.

Q. And the large majority of those claims were preferred by the Pacific Mail Steamship Company, were they not? A. That is so.

Q. Based upon coal laden for fuel purposes into its various steamships, the names of which were called to the attention of the witness Dickson.

Q. I direct your attention to a table which is entitled Exhibit "C," and which for the purpose of identification I will have marked "U. S. Exhibit 125, Table C," and ask you if that table was prepared by you?

A. It was prepared under my direction. [292—238]

Q. And were the figures subsequently checked by you? A. They were.

Q. So that those figures are in your judgment accurate and correct; is that so? A. Yes, I think so.

Q. I would like to have you explain to the jury, if you will, what that exhibit represents. * * *

(Testimony of W. H. Tidwell.)

A. This exhibit represents the amount of coal which was laden into barges of the Western Fuel Company, showing the vessel or yard or compartment from which it was received, the vessel on which the coal was discharged, the total amount which was discharged from the vessel, the overage, the amount for which no drawback was claimed, and also the amount for which drawback was claimed and paid, and also shows the amount which was laden upon army transports and revenue cutters.

Q. Does it show the name of the boats upon which the coal was imported? A. Yes.

Q. As taken from the records of the Western Fuel Company.

A. As taken from the records of the Western Fuel Company—well, in fact this is all taken from the records of the Western Fuel Company kept by Mr. Mills.

Q. And it shows the weight of coal as it was checked upon the barge; is that correct? A. Yes.

Q. That weight being the weight upon which the Western Fuel Company paid duties to the United States Government? A. Yes.

Q. And it shows the weight of the coal as it was checked out of the barge into the particular vessel into which the coal was laden? A. Yes.

Q. It is true, is it not, that it is upon that weight that these drawback claims were made and upon which the drawback claims were paid?

A. That is true.

Mr. ROCHE.—Will you admit, Mr. McCutchen,

(Testimony of W. H. Tidwell.)

that these [293—239] small sheets show the daily report of discharge of the Wellington coal from the steamship "Thor," and the final sheet represents a summary of the total coal discharged from her and destination?

Mr. McCUTCHEN.—I suppose all we can admit is that these statements were rendered to the Western Fuel Company by Mr. Meyer whose name is signed here as weigher.

Mr. ROCHE.—All right. I want to have this marked as an exhibit for the purpose of having the witness make a comparison with the books of Mr. Mills.

Mr. McCUTCHEN.—No objection.

Mr. ROCHE.—Mark this as U. S. Exhibit 126. We offer this as evidence; I do not suppose there will be any objection, so that I may use it hereafter. Mark it 126.

(The document was here marked "U. S. Exhibit No. 126.")

Q. The book which I hand you, Mr. Tidwell, purports to be the diary kept by the defendant Mills, does it not, for the year 1911? A. Yes.

Q. And so far as the entries are concerned, they are similar in kind to the entries made in the diary for 1906 to which your attention has heretofore been called? A. That is true.

Q. I direct your attention to "U. S. Exhibit No. 126," which purports to be first a daily report showing the discharge of the steamship "Thor" or New Wellington coal and the destination.

(Testimony of W. H. Tidwell.)

A. What date?

Q. Under the date of January 27, 1911, and the destination of the coal which was discharged from day to day from that steamship and likewise the final summary of the entire cargo discharged, and ask you if you will look at the entries made by the defendant Mills with reference to the discharge of that imported coal brought to this port into this steamship? [294—240]

A. I have it here; I can read it to you. On January 27, the steamship "Thor" 245 tons, 1070 lbs., to the wharf bunkers. 63 tons, 1288 lbs., to yard bunkers. 106 tons, 370 lbs., to the "Ruth."

Q. That is a barge, is it not?

A. Yes. 415 tons, 480 lbs.—the record does not show where that was placed.

Q. That is the total discharge for that day, is it not? A. That particular day.

Q. That represents the total coal discharged that day? A. Yes, that is true.

Q. Now, I call your attention for a moment to "U. S. Exhibit No. 126," to the daily report signed by E. Mayer, and ask you if those figures do not tally?

A. 245 tons, 1070 lbs. to the wharf bunkers, 63 tons, 1288 lbs. to yard bunkers; 106 tons, 370 lbs. to the "Ruth"; total 415 tons, 480 lbs.

Q. That is correct, is it not? A. That is correct.

Q. So that the entries to which you have just referred made by the defendant Mills in the diary kept by him and the entries made by the defendant Mayer in his daily report show that there was discharged

(Testimony of W. H. Tidwell.)

upon the barge "Ruth" 106 tons, 270 lbs.?

A. On that particular day.

Q. On that particular day. The other two entries we are not concerned with at the present time. The wharf bunker referred to in these daily reports means the inshore bunker, does it not?

A. The inshore bunker.

Q. Turn to the discharge of the coal contained in this book on the next day. A. On the 28th?

Q. That would be January 28th?

A. January 28 and 29, the record is shown here. 632 tons, 1220 lbs. wharf bunkers; [295—241] 688 tons, 240 lbs. yard bunkers; 289 tons, 2010 lbs. off-shore bunkers. 195 tons 1410 lbs. to the barge "Ruth"; I think that you will find that that has been added, the total of the two days' discharge, making a total of 1806 tons, 400 lbs., discharged during the two days.

Mr. McCUTCHEN.—Q. Will you give the amount that you said the "Ruth" was charged with?

A. January 27th, 106 tons, 370. lbs.

Mr. ROCHE.—Q. The entries which you have just read to me refer to the dates January 28 and January 29; is that correct?

A. January 27, 28 and 29, there are three days there.

Q. And the total there is what?

A. 1806 tons, 400 lbs.

Q. Now, that is for January 27, 28 and 29th.

Mr. McCUTCHEN.—Q. Now, give the amount that went on the "Ruth"?

(Testimony of W. H. Tidwell.)

A. Up to the present time, 195 tons, 1410 lbs.; on the 27th of January 1906, tons, 370 lbs.

Mr. ROCHE.—Up to that point of time, that is, taking into consideration the discharge of the coal during those first three days, there was discharged from the ship 2142 tons, 1470 lbs. Is that correct?

A. That is the fourth day's discharge.

Q. Look at your records of the 29th; there was a total discharge to the amount of 1806 tons, 1400 lbs.

A. That is correct.

Q. If you will look at the summary contained at the bottom of the daily report for January 29th, 1911, there is shown there, is there not, that there was discharged—

A. (Intg.) 1806 tons, 1400 lbs.

Q. That is the total discharged up to the evening of that day? Is that correct?

A. Yes. [296—242]

Q. And tallies with the figures kept by Mr. Mills?

A. Yes.

Q. Just proceed a little bit further. What do the entries by the defendant Mills in that diary show so far as the discharge of this boat is concerned on January 30, 1911?

[**Testimony of N. K. Wills, for the Government.**]

N. K. WILLS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I reside and have resided since 1907 in Seattle. I am a master mariner. I first visited Nanaimo in

(Testimony of N. K. Wills.)

1908. I have been there off and on a good deal. Since 1910, I have been there about ten months a year. I last visited Nanaimo in October, 1912. When I was residing at Nanaimo I was Acting Port Warden. My duties as such were to see that the vessels and scows were properly loaded and dispatched. I was also required to see that the vessels were properly loaded with coal at Nanaimo. Before I became port warden at Nanaimo, taking up my residence there, I had charge as master mariner for two years of a boat that visited Nanaimo about once every six weeks to take on coal destined ordinarily for Seattle. The name of my boat was the "Two Brothers." It was a barge carrying about 2,000 tons of coal. During the period when I was master mariner upon the "Two Brothers," and also during my residence at Nanaimo for ten months of each of the years 1911 and 1912, I found out the way the Western Fuel Company handled their coal in connection with weighing and discharging the coal into bunkers and into ships at Nanaimo. There was a scales-house at Nanaimo. It is about half way between the mine and the dock,—I should say it was about a quarter of a mile from the dock. [297—243] There was only one scales in the scales-house that I know of, but of course I have not visited Nanaimo since 1912. The scales was located right in front of the scales-house. Only one track consisting of two rails passed over the scales. That track came from the mine and proceeded to the different docks. A number of spurs or switches intersected the track.

(Testimony of N. K. Wills.)

Those switches or spurs ran off from the main line all along the main line, from said main line to the dock,—some between the mines and the scales, and some between the scales and the dock. The coal which would pass over the spurs or leads and ultimately reach the various docks would first pass over the tracks upon the scales. Some of the spurs or leads would connect with the main line between the scales-house and the mine.

I saw cargoes being weighed at the scales-house while I was at Nanaimo pretty often. I was frequently in the scales-house myself. This was all while I was residing at Nanaimo. I had no occasion to visit the scales-house while I was master mariner of the "Two Brothers." I used to take a tally of the cars that were discharged into my barge. I was just endeavoring to get a rough idea of how many tons went in. There was, of course, a tally kept of every car that was discharged into my barge. I did not have occasion to visit the office often, but I went up there sometimes. I did not visit the scales officially, but I did visit them unofficially. I saw them weigh coal. I never saw a carload of coal discharged into my boat, while I was captain of the "Two Brothers," which had not passed over the scales. I used to obtain my bill of lading and invoice, after the barge was loaded with coal, at the wharfinger's office. I do not know of my own knowledge how the weights set forth in the invoices or bills of lading were ascertained, [298—244] nor who furnished the weights or the invoices. The wharfinger presented

(Testimony of N. K. Wills.)

the bill of lading to me for signature. The scales-house was within my observation when I was counting the numbers of cars discharged into my barge. I used to see the cars as they approached from the scales-house. Each and every one of those cars that were within my observation first passed over the scales before they reached the dock. When I was residing at Nanaimo I saw cars run over the scales every day. The cars would stop when they reached the scales. I was sometimes in the scales-house myself when cars containing coal were being weighed. Never to my knowledge while I was a resident at Nanaimo was a carload of coal discharged upon the docks, either into vessels or bunkers, which was not first weighed. When I was master mariner of the "Two Brothers" the coal was discharged directly into the barge, not through a bunker. The process was by knocking the bottoms out of the wagons or cars and dropping the coal down a chute. There were bunkers located upon the docks at Nanaimo. Coal was discharged from time to time into these bunkers. It was then taken out for the purpose of loading boats. Every carload of coal that went into my boat was counted by me. That was so I could get approximately the amount of coal on board every night. I knew approximately the amount of coal each one of those cars contained. I did nothing whatever with the calculation which I had made. I made no comparison between my figures and the weight of the coal contained in the bill of lading.

(Testimony of N. K. Wills.)

Cross-examination by Mr. McCUTCHEN.

There was only one bunker at Nanaimo, consisting of a number of large bins. I don't know whether or not the company [299—245] has more than one mine at Nanaimo. I did not visit any mine. I simply visited the office and the scales-house. I heard of a mine up there called the Northfield mine. The coal which was weighed on the scales and of which I have spoken was not coming from that mine. The Northfield mine belongs to the Western Fuel Company, and coal is constantly being shipped from it by the Western Fuel Company by steamers. The steamers load at Northfield. I never saw any of that coal weighed on those scales. I have been at Northfield. I do not know the percentage of coal shipped from the Northfield mine as compared with the percentage shipped from the mine, the coal of which I saw weighed. I have no information whatever that would enable me to state that percentage. I am not prepared to say that more coal was taken from the Northfield mine than from the mine the coal from which was weighed on the scales to which I have referred. It is my understanding that the coal having been weighed on the scales then goes by car along the extension of that track to the bunkers or to the ships. There were ordinarily 25 cars in a coal train. The locomotive followed the cars. They were weighed one at a time. I do not know what the locomotive weighed. I do not think it ever went on the scales; at least I never saw it go over the scales. After the cars were weighed, the train was hauled

(Testimony of N. K. Wills.)

back and switched off. The switches that I have mentioned were not all between the mine and the scales-house. There could be switches the other side of the scales just as well. I do not know why it was necessary to pull the train back. I never saw a train that was weighed that was not pulled back before being switched. The uniform experience when I was there was to pull the train back toward the mine after the coal was weighed. I still say that [300—246] there were switches on both sides of the scales-house. I never saw any congestion of cars between the scales-house and the bunkers. I have seen more than one train on the track between the scales-house and the bunkers, but I could not say how many. As port captain at Nanaimo it became my duty to go to the Northfield bunkers from time to time, but I went there very seldom, perhaps two or three times a year when my own vessel was loading, and only then. I did not go there when I was port captain to see other vessels load. I know of my own knowledge that other vessels did load there frequently; they were large vessels. I know that from actually having seen the vessels loading. There was a very large quantity of coal loaded at the bunkers connected with the Northfield mine during the years I was port captain; and a large number of vessels and a large number of steamers of large tonnage loaded at those bunkers during the years that I was master mariner and running a barge from Nanaimo to Seattle.

Redirect Examination by Mr. ROCHE.

My barge sometimes called at Northfield. I do

(Testimony of N. K. Wills.)

not know whether there were any scales located near the Northfield mine or between the Northfield mine and the bunker. I know of my own knowledge that every one of the twenty-five cars that was shoved on the scales by a locomotive at Nanaimo was weighed on the scales. The coal that I took from Nanaimo in my barge to Seattle was lump coal which had passed over the screen. It was called Nanaimo lump coal. When I was port captain at Nanaimo I frequently saw other boats loaded with cargoes of coal. They were always loaded in the same way.

Q. You testified upon cross-examination that you sometimes saw as many as three train loads of cars between the scales and the bunkers; is that correct?

A. Yes, sir. [301—247]

Q. Did you ever see any of those cars weighed?

A. No, sir.

Q. Before those cars would reach the bunkers, or before they would reach the ship into which the coal would be discharged, would you observe the cars being moved upon the scales? A. Yes, sir.

Recross-examination by Mr. McCUTCHEN.

I have seen a ship partly loaded at Northfield and partly loaded at Nanaimo. That occurred quite often. I was employed by Frank Waterhouse & Company when I was port captain. That corporation was a shipping company located at Seattle.

[Testimony of W. J. Dougherty, for the
Government.]

W. J. DOUGHERTY, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live now and have lived for about seven years in San Francisco. I have been United States weigher since the 25th of November, 1913. Prior to that time I was assistant weigher for a year and a half connected with the customs-house in San Francisco. Before that I was in the customs service here as a clerk. When I was assistant weigher I had occasion to visit the scales-office of the Western Fuel Company on the Folsom street dock. I acted as assistant weigher there a number of times before I became weigher, perhaps 15 times. Those were occasions when a vessel was being discharged of foreign imported coal. I was weighing the coal. It was the custom to weigh the coal on a rising beam.

Q. Now, I want you to go on and explain to the jury in [302—248] your own way what you mean by a rising beam.

A. Well, a rising beam is such a beam as when released by the upper brake, if the scale is at balance, will rise with a gentle upward motion, and if allowed to come to rest or to equilibrium, will rise at the center of the scale.

Q. Will rise at the center of the scale?

A. Between the upper and the lower brake.

Q. Was the practice in which you indulged to

(Testimony of W. J. Dougherty.)

weigh the coal when the beam would rise rapidly?

A. No, sir.

Q. Did you ever see that practice indulged in?

A. No, sir, I never did.

Q. Do you know of your own knowledge approximately what the difference in weight of the coal which you were weighing would be if the coal were weighed upon a horizontal or even beam, and when weighed, as you did it, upon a gently rising beam?

A. It would not be over ten pounds to each weight that was taken.

Q. And what was each weight that was taken, approximately?

A. Well, approximately about five tons.

Q. In other words, the Western Fuel Company would have the advantage of not more than ten pounds upon each weight taken, which would be in the neighborhood of five tons; is that correct?

A. Yes, sir.

Q. And what part of that gross tonnage would represent the tare weight, that is, the weight of the cars, approximately?

A. Well, approximately, the cars weighed about 10,000 pounds.

Q. So that it would represent about 10,000 pounds of coal; is that correct?

A. A little over ten thousand, about five tons.

Q. In other words, they would get the benefit of not to exceed ten pounds of coal in a weight of ten thousand pounds of coal?

A. Yes, sir, as I understand it. [303—249]

(Testimony of W. J. Dougherty.)

Cross-examination by Mr. STANLEY MOORE.

I am now the chief weigher. At the present time there are 23 assistant weighers under me. The number was formerly 25. I am not weighing coal any more. The duty on coal was declared off last October. Before I became assistant weigher I was employed most of the time in what is known as the first division, under the collector. My duties were of a clerical nature and included invoices on the cargoes of coal. I did no actual weighing. I became assistant weigher September 6, 1912. I was not appointed to that position at the request of Mr. Tidwell, but at the request of the collector, who promoted me.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

Q. What other commodities were weighed by you, just generally, outside of coal, during the year and a half approximately that you occupied the position of an assistant weigher?

A. Well, I weighed various commodities at the Pacific Mail dock, rice, beans, some chow, as it is known, which is Japanese and Chinese foodstuffs; I also weighed at various places pig iron, coke, casks of different materials, chemicals and various things of that kind.

Q. When you were weighing the pig iron, you weighed that also, did you not, with a rising beam?

A. Yes, sir.

Q. What commodities or articles outside of coal

(Testimony of W. J. Dougherty.)

and pig iron were you accustomed to weighing with the rising beam?

A. Well, coke is one; in fact, the greater number of articles; the regulation is that on almost everything the rising beam is used, anything of a bulky or cumbersome nature. [304—250]

Q. Anything of a bulky or cumbersome nature; the regulation is that coal shall be weighed with a rising beam, is it not? A. Yes.

Q. And that pig iron shall be weighed with a rising beam?

Mr. ROCHE.—Just a moment. That is objected to as immaterial.

Mr. STANLEY MOORE.—I want to examine him, if your Honor please, as to what things were weighed with a rising beam.

The COURT.—The question will be permitted; just what light it will shed on this subject, though, I could not say.

Mr. STANLEY MOORE.—Q. Salt was weighed with a rising beam, was it not?

A. I have never weighed salt, so I cannot say personally.

Q. Is it not a fact that most of the articles are not weighed on a rising beam?

Mr. ROCHE.—That is objected to, may it please the court, as calling for the conclusion of the witness, and upon the further ground that the regulation upon which counsel relies has already been read in evidence.

Mr. STANLEY MOORE.—It goes to his knowl-

(Testimony of W. J. Dougherty.)
edge and his experience as a weigher.

The COURT.—The objection is sustained. You might inquire into his knowledge and experience as a weigher of coal, if you wish to.

Mr. STANLEY MOORE.—Very well, your Honor, we note an exception.

I have weighed coal at the Green street bunkers but very infrequently. I recall having been there once for a week when a ship was discharging. I have also weighed at the [305—251] Howard wharf in Oakland, and I have weighed overside at China Basin. By weighing overside I mean when a vessel is discharging into a barge from its deck, or into another vessel from the deck of the first mentioned vessel. The vessel on which I weighed overside at China Basin was one of the Harrison liners. The occasion was prior to Christmas, 1912. The vessel came, I think, from Antwerp. I think she was being unloaded. I have on a number of occasions weighed coal out of a barge into a vessel carrying the American flag. I would say that I have done that oftener than I have weighed coal on the Folsom street bunkers. I think I have weighed coal from barges into pretty nearly all the vessels of the Pacific Mail Steamship Company. I remember having weighed coal into the "Korea." The first thing that an assistant weigher does before beginning to weigh coal at Folsom street is to test the balance of the scale. I used to do that of course. The purpose is to find out whether there is any weight upon the scale, and to make sure that it is going to weigh cor-

(Testimony of W. J. Dougherty.)

rectly. If a scale does not balance, we look around to see what is the matter, and if the platform is clean and swept. If the scale does not balance, then we can by resorting to a certain contrivance on the scale, make it balance. I would not go on with the job until I got the scales balanced. The scales, having been balanced, we are ready to begin weighing. We take the tare weights during the weighing of the first ten cars. We feel that we get a more correct tare if we wait until the cars have loosened up a little, so we weigh usually the fourth or fifth. Often times the four hatches are all working during the discharge of a vessel at Folsom street. One hopper is allotted to each hatch, I think, but I have not observed that closely. It is important to keep [306—252] the hatches clear and the hoppers from clogging so that the work may proceed apace. The locomotive approaches the scales with two cars attached. They are weighed two at a time. One car is called the locomotive car, and two cars are attached to it. Then there is another locomotive and two more cars, so that you have a double train. When you are detailed to Folsom street as an assistant weigher your orders are to remain there with the job until the work is completed, and you do so unless some one is sent there in an emergency to relieve you, or something of that kind. I have worked there four or five days on a stretch in unloading a vessel. On other occasions we have unloaded a vessel in three days. About 4,000 tons, I should think, would be handled in four or five days. The most that I re-

(Testimony of W. J. Dougherty.)

member going up to the scales are four cars in a train aside from locomotive cars. I do not remember any long strings of cars attached to the locomotive. In fact, I remember that they did not have strings of cars. Two cars are weighed at a time. I have seen weighing done in a very short space of time. I think it takes longer than ten seconds. I have seen some people slower and others faster than I weigh. I do not think I have seen two cars weighed in less than ten seconds. Candidly, I do not know how long it takes me to weigh two cars.

Q. The operation that you go through with, Mr. Dougherty, is that you have the beam clear down and then you start back?

A. The beam is down, yes.

Q. When you start back, how long does it take you before you make your weight?

A. I cannot set the exact time.

Q. You cannot set any exact time? A. No.

Q. Is it not a fact that you carry your pin back, or poise, and when you see the beam start to rise, the time that you figure is right that it will rise, you make some kind of a movement which clamps the scales and brings the whole proceeding instantly [307—253] to a halt, do you not? That is a fact, is it not, Mr. Dougherty?

A. That is a fact, yes, sir.

Q. As a matter of fact, you don't generally wait for it to go up to the top and down at all, do you?

A. No, sir.

Q. You just guess at it, so to speak?

(Testimony of W. J. Dougherty.)

A. Well, I don't think that is hardly the word to use.

Q. You use your judgment on it, do you?

A. Yes, sir.

Q. You don't wait for the beam to go up there and come back again, do you?

A. Not usually, although I have done it if I was not satisfied.

Q. But as a usual thing with you weighing coal that way, time after time when the beam starts to rise, you clamp this adjustment on, or whatever it may be, and bring this proceeding to a halt, do you not?

A. No, not when it starts to rise; I let the beam rise some little distance. If in my judgment it rises so it will return to the central position, I clamp the beam. But, as I was saying, if it goes with too great a speed, and I am in doubt, I would then let the beam go up to the upper notch and descend before clamping the beam and fixing the weight.

Q. But that is not what you usually do, is it? In the number of weighings that you would make in a day, that would be the lesser proportion in which that movement would occur, would it not?

A. It probably would be.

Q. What is the space, Mr. Dougherty, that the beam has an opportunity to rise up and down in?

A. Between the two clamps, do you mean?

Q. Yes.

A. That space is about 2 3/8 inches, or something of that kind.

(Testimony of W. J. Dougherty.)

Q. And what part of that space is usually traversed by that beam before you bring the proceedings to a halt? A. About half of it. [308—254]

Q. Then, after the beam has arisen a little over an inch you bring the matter to a stop, do you not?

A. If the beam were rising so that I thought it would settle at center.

Q. And at other times you will let it go clear to the top?

A. If I thought the beam was too heavy, I would let it go to the top in order to move back and get the proper weight.

Q. Who reads the weight that is thus arrived at, Mr. Dougherty?

A. The weigher in charge, the assistant weigher.

Q. Do you know of your own knowledge, Mr. Dougherty, having in mind the process of weighing usually followed by you, namely, where you bring the proceedings to a stop after the beam has commenced to rise and when it has got about half way up through this space, on a Fairbanks-Morse scale designed to weigh quantities of 20,000 pounds, do you know how many pounds it takes to break that beam and cause it to rise?

Mr. ROCHE.—That is, you mean to rise at all?

Mr. STANLEY MOORE.—Yes, that causes the beam to rise, where it is clear down on the bottom like you say that it is when you begin this process of weighing?

A. Well, almost any weight on the platform will cause the beam to rise somewhat.

(Testimony of W. J. Dougherty.)

Q. But where you are weighing 20,000 pounds, and your beam is already down and is clear down, as I understand it is when you commence this usual process of weighing, do you say that almost any quantity will cause it to rise, then?

A. I don't know that I get your question clearly.

Mr. ROCHE.—You mean any quantity above the exact weight, do you?

Mr. STANLEY MOORE.—I will examine him, Mr. Roche. [309—255]

Q. Assume, for the purposes of the question, Mr. Dougherty, that there are two cars on the scales, and that you weigh them two at the time, and that the gross weight of those cars with their contents is in the neighborhood of 20,000 pounds; and we will assume that you have gone through these preliminary movements that are characteristic to every weighing, and by manipulation of the poises have got the beam clear down; you understand what I mean now?

A. The beam would be clear down at starting; the beam is down at starting.

Q. Yes; do you know how many pounds it takes to break one of those scales in excess of the object that is actually upon the scales, where it is clear down, and to cause it to rise that way?

A. You mean to rise beyond the center?

Q. Yes. A. Beyond the center upwards?

Q. I do.

Mr. ROCHE.—That is objected to, may it please the Court, on the ground that the question put by

(Testimony of W. J. Dougherty.)

counsel to the witness does not mean anything of the kind.

Mr. STANLEY MOORE.—Well, I am willing to have it meant that way. He can answer it the way he wants to.

Mr. ROCHE.—But the difficulty about that is, that the question is in the record, and the question that is in the record calls for a weight to break the scales.

Mr. STANLEY MOORE.—Q. We will assume, then, Mr. Dougherty, just as you suggested here, that there are 20,000 pounds on the scales, and that the beam is all of the way down; now, do you know how much weight, in excess of the actual weight of 20,000 pounds that we assume to be on those scales, will cause that beam to come up and go above the center of that space of $2\frac{3}{8}$ inches? [310—256]

A. May I ask for one explanation of your question?

Q. No, just answer the question.

A. Well, will you kindly repeat it, I don't quite understand it yet.

Q. Certainly, I will do that. Assume, Mr. Dougherty, that the actual weight represented by the two cars and their loads, which was then upon the scales, to be 20,000 pounds. Now, assuming that you are going to weigh that, and that you have shoved over the poises until the beam is clear down; now, do you know how much, if any, weight in excess of 20,000 would cause that beam to rise above the center of that space of $2\frac{3}{8}$ inches?

(Testimony of W. J. Dougherty.)

Mr. ROCHE.—That question, may it please the Court, is objected to on the ground that it is unintelligible.

Mr. STANLEY MOORE.—Q. Do you understand it, Mr. Dougherty?

A. I don't see what the first part of it has to do with the latter part.

Q. Do you know whether it would take from 20 to 30 pounds, or do you know whether or not you would have to give that weight of 20,000 pounds actually upon the scales a credit of 20 or 30 pounds in order to cause that beam to rise above the center line, where the beam was all the way down to begin with?

A. You would not have to give that much.

Q. Do you know how much you would have to give?

A. I think you would have to give about ten pounds, not over ten pounds.

Q. You think you would have to give ten pounds, do you not, from the fact that those scales are graduated about that way?

A. No, sir, not necessarily.

Q. Have you made any experiments with a Fairbanks-Morse scale built and designed for weighing objects as heavy as 20,000 pounds to determine whether ten or twenty pounds would cause the beam to rise above the center, under the conditions that I have just mentioned to you?

A. Not with 20,000 pounds of weight, no. [311—257]

Q. You have spoken about seeing other people weighing; have you seen weighing done there so

(Testimony of W. J. Dougherty.)

quickly that they did not wait in any case for the beam to go clear up to the top?

A. I cannot say that I have.

Q. You have seen weighing done more rapidly than is customarily done by yourself, have you not?

A. I have.

When I was weighing down there, there would be present the clerk, the weigher of the Western Fuel Company, and sometimes, if the ship were a foreign ship, her clerk, or perhaps the clerk of some consignee. The Government weigher did the actual weighing, and called off the weight; and if I were the Government weigher, I would be the one who would do that. When I was weighing coal from the barges into vessels carrying the American flag, one tub out of 15 would be weighed.

Redirect Examination by Mr. ROCHE.

I never have seen any custom-house weigher weigh coal upon the scales of Folsom street too rapidly to weigh the coal correctly.

Q. Suppose those scales were set by you to weigh a load of 20,000 pounds, and suppose a load of 20,010 pounds were run upon those scales, in what position would the beam be after that weight was located upon the scales? A. The beam would rise.

Q. How high would it rise?

A. It would rise to the upper brake.

Q. That is, to the upper part of the frame; is that correct? A. Yes, sir.

Q. With ten pounds more than the 20,000 pounds on the scales? A. Yes, sir.

(Testimony of W. J. Dougherty.)

Mr. ROCHE.—Take the witness.

Recross-examination by Mr. STANLEY MOORE.

Mr STANLEY MOORE.—Q. Do you think that a scale designed for weighing 20,000 pounds is as sensitive and will rise [312—258] as quickly where the beam is clear down to the bottom as it would if a corresponding weight were put upon it and the beam was already at the top? Do you think it will move as quickly?

A. I don't quite understand your question.

Q. Well, the question is intended to be this: Generally, do you think that a scales would be as sensitive to some weight added to an already existing weight upon the scales where the beam was clear down as it would be if it were all the way up; in other words, do you think it will go up as quickly as it will come down?

A. It will go up, but I don't know about the quickness of it.

Q. And you never have made any experiments with respect to that?

A. I have, but not to that amount, not to 20,000 pounds.

Q. Well, you know, do you not, that scales are more or less sensitive according as to the largeness of amounts and the heaviness of weights which they are designed to weigh? You know enough about scales to know that, do you not?

A. I think I do.

Q. Well, that, according to your judgment, is the fact, is it not? A. Yes.

(Testimony of W. J. Dougherty.)

Q. The sensitiveness of scales varies somewhat as to the amount of weight which they are designed for weighing? A. Yes.

The twenty odd assistant weighers in the Government service are shifted about so that no particular weigher was assigned permanently to duty upon the Folsom street dock, but that would not be true with regard to the other docks.

Further Redirect Examination by Mr. ROCHE.

Mr. ROCHE.—Q. I just want to ask you two or three questions, Mr. Dougherty. How small a quantity of coal in weight can be weighed or could be weighed upon these scales?

Mr. STANLEY MOORE.—If he knows.

A. Well, I imagine that five pounds of coal could be weighed.

Mr. ROCHE.—Q. In fact, you testified upon cross-examination [313—259] that sometimes when you would endeavor to test the scales, you would have to have the scales cleaned off so that the scales would balance? A. Yes, sir.

Q. By the way, Mr. Dougherty, it is true, is it not, that by revolving this contrivance upon threads which is located upon one end of the beam, so as to make the scales balance, the scales can balance and yet not weigh accurately; is not that correct?

A. That is true.

The weigher at the scales-house faces, as near as my judgment is, towards the west, with his back towards the operations on the dock. If he were to turn around, during the rapidly moving operations

(Testimony of W. J. Dougherty.)

on the bunkers, he could, from his station in the scales-house, not see much of anything. He could see the westerly side of a hopper, but he could not see the coal coming up; he could see part of one car that is being loaded from the hopper nearest to the west. I do not think, however, that he could see the coal actually being discharged even into the first car. He could see the bucket coming up from the ship to be discharged into the first hopper. If the weigher turned around he could not then see the coal discharged from the first hopper into the cars located underneath the hopper. He could only see part of the car. He could not see the entire operation. My impression is that he could not see the chutes protruding down from the bottom of the first hopper. The weigher from his position in the scales-house cannot see the position of the cars upon the scales. The space between the top of the coal-cars and the bottom of the hoppers is not very great.

(The attention of the witness is here directed to a photograph marked "United States Exhibit No. 7" which purports [314—260] to have been taken through the easterly window in the scales-house, looking out of that window when there is no coal-car underneath the first hopper.) This photograph represents just about what you can see by looking out of that window where there is no coal-car underneath that first hopper.

I have sometimes seen a car partially filled at the first hopper, and then run back, but I do not know where it got the rest of its load, though I presume,

(Testimony of W. J. Dougherty.)

from another hopper. When the car backed away from the first hopper in that fashion, I could not tell what became of the coal within it. The constant discharge of coal from the ship into these four hoppers creates more or less noise; in fact, the coal dropping from the bucket into the four hoppers, and the noise of the engine and the manipulation of these coal-cars and the motor car make a great deal of noise.

Further Recross-examination by Mr. STANLEY MOORE.

If the weigher were to get up and go to the window he could not see beyond the first hopper for any material distance.

(Conceded by counsel for the Government that the hoppers are necessary down there, considering the way the coal is handled.)

To my observation and personal knowledge, I can only say that the bunkers, the scales-house and the hoppers have been down there at Folsom Street only since I have been assistant weigher. I never knew personally that they were there until a year and a half ago. I had never been down there to see them.

[Testimony of D. C. Norcross, for the Government (Recalled).]

D. C. NORCROSS, recalled for the United States, testified as follows:

Mr. ROCHE.—Q. Mr. Norcross, when coal would be discharged from a barge and laden upon a vessel for fuel purposes, [315—261] would any memo-

(Testimony of D. C. Norcross.)

randa of such coal be sent by Mr. Mills to the Western Fuel Company? A. It would.

Q. That is, showing the quantity of coal laden upon the vessel and the particular barge from which the coal was discharged? A. Yes.

Q. And likewise the boat from which the coal was laden upon the barge either directly or by means of the offshore bunker or compartments contained in that bunker? A. I believe it shows that, yes.

Q. I call your attention to some cards fastened together and numbered from 1851 to 1999, and endorsed on the back "Coal Deliveries of Vessels, 1851—1999," and ask you whether those cards are not the cards sent by Mr. Mills, by the defendant Mills, to the Western Fuel Company, indicating the coal laden upon these vessels? A. Yes, they are.

Q. Would these be sent to the main office by Mr. Mills each day?

A. Whenever a delivery was made.

Q. Whenever a delivery was made? A. Yes.

Q. Who in the main office would receive those cards? A. The bookkeeper, Mr. Martin.

Q. Would they ultimately be turned over to you?

A. No.

Q. So that, as a matter of fact, Mr. Norcross, records such as these every time a vessel was loaded with coal for fuel purposes, would be sent by the defendant Mills to the office of the Western Fuel Company?

A. Yes.

Mr. ROCHE.—Will you admit the handwriting

(Testimony of D. C. Norcross.)

contained on those cards is the handwriting of Mr. Mills?

Q. It is a fact, is it not, Mr. Norcross, that each one of these cards is made out in the handwriting of Mr. Mills, so far as these are concerned? (Addressing counsel.) Subject to correction, [316—262] will you make that admission?

The WITNESS.—I think they are.

Q. In other words, Mr. Norcross, it was the custom of Mr. Mills to make out these cards or tags?

A. Yes.

Q. And they would be made out by him except when his duties were being temporarily performed by some other person? A. That is right.

[Testimony of W. H. Tidwell, for the Government (Recalled)].

W. H. TIDWELL, recalled for the United States, testified as follows:

Mr. ROCHE.—Q. Will you take that diary again, Mr. Tidwell. Let the record show that I am returning to the diary in reference to which the witness was being examined at the time court adjourned for the noon recess.

The WITNESS.—I think it was 1911 you were examining me about.

Q. You were being examined in relation to some data appearing under the dates January 27th to January 30th.

A. As to the discharge of the steamship “Thor”?

Q. Yes. A. Yes.

Q. Does that diary show the invoice weight of the

(Testimony of W. H. Tidwell.)

coal upon that steamship or does it simply show the shortage, if in fact there was a shortage?

A. It shows the weight discharged from day to day and after the completed discharge of the vessel shows the overage or shortage, in this instance, a shortage.

Q. Does it also show the out-turn weights, what is known as the ascertained weights?

A. From the steamer?

Q. Yes. A. Yes. [317—263]

Q. How many tons of coal are shown by that record—that is, the record kept by the defendant Mills, as indicating the out-turn or discharge weights?

A. 7190 tons, 1140 lbs.

Q. And the shortage is what?

A. Short 52 tons, 1100 lbs.

Q. Calling your attention to this summary which is signed by the defendant, E. Mayer, and to which your attention was directed this morning, I will ask you if it is not the fact that the figures which you have just given me, read from the diary kept by the defendant Mills, are similar to the figures appearing upon this summary? A. Yes.

Q. That has invoiced 7243 tons, discharged—

A. (Intg.), 7190 tons, 1140 lbs.; short 52 tons, 1100 lbs.

Q. But in the record kept by the defendant Mills which you hold in your hand, the invoice weight which here is given of 7243 tons, is not set forth?

A. Is not set forth.

Q. I would like to have you turn to the record

(Testimony of W. H. Tidwell.)

which you now hold in your hand, being the record kept by the defendant Mills, and state, if you will, what amount of the coal thus discharged from the steamship "Thor" was discharged into the various barges and into the offshore bunker or compartments of that bunker?

A. Does that question include the inshore bunkers as well?

Q. I do not care about the inshore.

A. The offshore bunker, 641 tons, 30 lbs.; the barge "Ruth," 195 tons, 1410 lbs.; the barge "Ruth" received again 349 tons; the barge "Nanaimo" 412 tons, 2090 lbs. The barge "Theobald" 946 tons, 1140 lbs.; the barge "Comanche" 702 tons, 1160 lbs.

Q. Have you got a total there of the quantity of coal discharged [318—264] into the barges and the offshore bunkers?

A. No, it is *totalled* separately; it is totalled together, including the wharf bunkers and the yard.

Q. Can you take a pencil, Mr. Tidwell, and I will only ask you to do it in this instance, for the purpose of getting the total from this document which I hold in my hand, being a summary of coal discharged from the steamship "Thor" upon that trip, so as to ascertain whether the totals appearing upon this discharge—sheet or summary-sheet equal those to which you have just testified. I will read them off to you: barge "Ruth" 106 tons, 370 lbs.; 89 tons, 1040 lbs.; 74 tons, 1300 lbs.; 274 tons, 940 lbs.?

A. 544 tons, 1410 lbs.

Q. Is that the exact weight which according to the

(Testimony of W. H. Tidwell.)

records kept by the defendant Mills was laden upon the barge "Ruth" taken off the steamship "Thor" upon that barge?

A. There are two items here; I will have to add these together, one of 195 tons, 1410 lbs.; and the other of 349 tons, 544 tons, 1410 lbs.; exactly the same.

Q. Exactly the same? A. Yes.

Mr. ROCHE.—With your Honor's permission, I just want to make two or three calculations, and I won't press this any further, so as to establish the identity between these records.

Q. Directing your attention again to the summary of the coal discharged from the steamship "Thor" upon this particular voyage, I will read to you the figures off of the summary signed by the defendant Mayer indicating coal deposited in the offshore bunker, 255 tons, 100 lbs.

Mr. McCUTCHEN.—What date is that? [319—265]

Mr. ROCHE.—That is the same date. This is the summary-sheet, Mr. McCutchen, ranging from the 27th to the 30th of January.

The WITNESS.—They are looking for the barge "Ruth"; it is January 30th.

Mr. ROCHE.—This vessel did not completely discharge until the 3d of February, and in order to avoid taking up any further time, I have not called the witness' attention to any of these tally-sheets which were filed after the 30th of January.

Q. Referring again to coal which, according to

(Testimony of W. H. Tidwell.)

this record appears to have been deposited in the offshore bunkers, 255 tons, 100 lbs. 34 tons, 1910 lbs.; 79 tons, 1150 lbs.; 151 tons, 590 lbs.; 120 tons, 760 lbs.? A. 640 tons, 130 lbs.

Q. Is that the same quantity of coal which, according to the records are kept by the defendant Mills in the diary which you now have in your hands was deposited in the offshore bunker, from that sheet?

A. 641 tons, 30 lbs., a difference there of one ton and 100 lbs. Let us see if I have an error there. Yes, it is 641 tons, 30 lbs.

Q. The figures in the statement from which I have read tally, do they not, with the figures contained on the record kept by the defendant Mills?

A. They do.

Q. Will you also look at that record and see whether out of the coal discharged from the steamship "Thor" there was deposited upon the barge "Comanche" 702 tons, 1160 lbs.? A. Yes.

Q. And upon the barge "Nanaimo" 290 tons, 670 lbs.?

A. That does not check; the barge "Nanaimo" is 412 tons, 2090 lbs. [320—266]

Q. I see there is another entry here. Just take those figures, 290 tons, 670 lbs., and 122 tons, 1420 lbs., and see if the addition of those figures does not equal the amount which the record kept by Mr. Mills shows was deposited in that barge?

A. 412 tons, 2090 lbs.

Q. That tallies too, does it not? A. Yes.

Q. Directing your attention again to these entries,

(Testimony of W. H. Tidwell.)

Mr. Tidwell, for the purpose of verifying the dates, do the entries which are contained in that diary kept by the defendant Mills, show the actual deposits each day, for instance, in the offshore bunkers, and likewise in barges? A. Yes.

Q. Now, directing your attention to the date, January 27, 1911, the barge "Ruth," does that record show the number of tons as well as lbs. of coal discharged or rather laden upon the barge "Ruth," representing coal discharged from the steamship "Thor"?

A. I don't understand what you refer to, the discharge from the "Thor" or the receipt on the "Ruth."

The COURT.—He means both discharge from the "Thor" and laden into the "Ruth."

A. On January 27th there was discharged from the "Thor" 106 tons, 370 lbs., which was laden on the "Ruth."

Q. Now, on January 28th was there 89 tons, 1040 lbs. of the same coal laden upon the barge "Ruth"?

A. It shows a total; it does not show the difference of the two; a total of 195 tons, 1410 lbs.

Q. That would be, would it not, the first quantity plus 89 tons, 1040 lbs.? A. Yes.

Q. And that additional quantity of coal was deposited according to the record which you hold in your hand on the barge "Ruth" on January 28, 1911; is that correct? [321—267]

A. January 28 and 29; they are both under the same date here.

(Testimony of W. H. Tidwell.)

Q. The 28th and 29th. Now, will you also look at that record and ascertain whether on or before February 1, 1911, there was likewise laden upon the barge "Ruth" 74 tons, 1300 lbs. additional coal?

A. Yes, the record so states.

Q. Of this cargo? A. From the "Thor."

Q. On February 2, 274 tons, 940 lbs.; additional coal taken from the steamer "Thor"?

A. It shows on the "Thor" on February 2d, 195 tons, 1410 lbs. and then there is an additional amount of 349 tons on the "Ruth."

Q. Will you look at that record and see whether or not on the 2d of February there was discharged from this ship and laden upon the barge "Theobold" 693 tons, 1170 lbs.? A. The item so appears.

Q. And a further quantity of coal upon the same date, consisting of 252 tons, 2210 lbs., laden upon that barge, that is, the "Theobold,"—on the 3rd of February, I mean; is that correct?

A. It shows an increase to 946 tons, 1140 lbs. The difference between the two—I suppose that is correct.

Q. And the overage appearing as a result of the discharge of the steamship "Thor"—

A. (Intg.) A shortage.

Q. A shortage of 52 tons, 1100 lbs.?

A. That is correct.

Mr. ROCHE.—I would like to have the jury look at that entry.

Q. This entry is typical, is it not, Mr. Tidwell, of all the entries not only in this diary but in the re-

(Testimony of W. H. Tidwell.)

maining diaries which have been introduced in evidence kept by the defendant Mills; is that correct?

A. Yes, that is true.

Q. Where do these entries appear? The first one begins here [322—268] under date of January 27th, does it not?

A. Yes, and January 28th, January 30th and 31st, and continuous down to here, that entire column.

Q. That is the last item relating to this particular cargo appears under date of Friday, February 3rd; is that correct? A. Yes.

Q. And the last entry relating to the discharge of that cargo are the words and figures, "Short 52 tons, 1100 lbs."; is that correct?

A. Yes. You will usually find the discharge of the ship on the right hand side of the page, and the barges on the left.

Q. In other words, so that the jurors may understand these entries, the name of the ship from which the cargo is being discharged appears upon the right hand side of these pages; is that correct?

A. Usually, yes.

Q. And the barges?

A. On the left hand side of the page.

Q. The barges into which the coal is laden appears upon the left hand side of the page; is that correct?

A. That is correct.

Q. As well as the designation of the bunkers in the event the coal is discharged into the bunkers?

A. Yes.

Q. And instead of each quantity of coal after the

(Testimony of W. H. Tidwell.)

first day that is laden upon the barges or discharged into the bunkers being separately itemized, the totals are inserted here, are they not?

A. That is correct.

Q. In other words, if on the first day 500 tons is laden upon a particular barge and the next day 200 tons is laden upon that barge the record of the second day will contain the total quantity of coal, or 700 tons? A. 700 tons on the barge. [323—269]

Q. So that in order to ascertain the exact quantity of coal each day taken from a particular ship and laden upon a barge you would have to follow these items back from the discharge of the ship to the first day and make the necessary deductions; is that correct? A. That is true.

Q. Or subtract it.

A. Or, on the final discharge of the ship it will show the amount placed on each barge or bunkers or other place.

Q. That book, Mr. Tidwell, and I will call the attention of the jury to another item in that book likewise, shows, does it not, the quantity of coal taken from the barges at a subsequent date and laden into other vessels and likewise the overage wherever such overage occurs? A. That is true.

Q. That is the difference between the quantity of coal checked into the barge and the quantity weighed out of the barge? A. That is correct.

Q. And as I understand your testimony, in about 99 per cent of these cases there was also an overage?

A. Yes, I should say that much.

(Testimony of W. H. Tidwell.)

Q. In 99 per cent or more? A. Yes.

Q. The quantity of coal discharged from the steamship "Thor" and laden upon the barges, to which your attention has already been called, is set forth in your Table C, is it?

A. Not the "Thor," no; the "Thor" would be set forth in Table A.

Q. You did not understand my question. I mean the quantity of coal which originally came from the steamship "Thor" and was afterward laden upon these various barges and subsequently discharged into the vessels is shown in this Table C?

A. Yes. It will be shown—the various barges will be shown in Table C, showing the amount of coal that each received from [324—270] the "Thor."

Q. Now, Mr. Tidwell, let me ask you this question: The particular entries to which I have just directed your attention show that there was a shortage of some 52 tons upon the discharge of the steamship "Thor" below the invoice or bill of lading weight; is that correct? A. That is true.

Q. And those entries do also show that a considerable quantity of that coal was laden directly by means of the offshore bunkers, I suppose upon barges or in the offshore bunkers, which coal was subsequently laden upon barges, and with which coal vessels were coaled; is that correct? A. That is true.

Q. Is it not also the fact, Mr. Tidwell, that this same book which discloses the quantity of coal upon which the Western Fuel Company paid duties to the United States Government likewise shows an over-

(Testimony of W. H. Tidwell.)

age in so far as the discharge of that coal is concerned from the barge, and upon that overage the Western Fuel Company or rather the United States Government paid back to the Pacific Mail Company drawback claims? A. That is true.

Q. Or a part of the duties paid?

A. That is true.

* * * * *

Q. You have, as you have already testified, compiled a table, in which table appears the quantity of coal checked in to the barges and subsequently discharged from the barges into these vessels?

A. Yes.

Q. Will you take that table please, and point out that particular part of the table which relates to the coal which was discharged [325—271] from this particular steamship into these barges, and subsequently discharged from the barges into some of these vessels?

A. I will have to use that book in connection with it.

Q. Yes, start in with January 27th.

A. 1911?

Q. Yes; the cleanup might have occurred a few days after that date.

A. On the barge "Ruth"?

Q. Take the barge "Ruth."

Mr. McCUTCHEN.—What page of the transcript is that?

A. That is page 59, under date of January 30th.

Mr. ROCHE.—Q. That is on the table it appears under the date of January 30th?

(Testimony of W. H. Tidwell.)

A. Yes, that is the date of the cleanup of the barge.

Q. Will you just indicate to the jury what you mean by the cleanup of the barge?

A. When all the coal has been checked out of the barge.

Q. And until that is done, of course, it is impossible to tell whether there is an overage or shortage upon the barge? A. Yes.

Q. And the reason for that is that it equally occurs that the barge would take on, we will say for the purpose of illustration, 1000 tons of coal on one day and then discharge a part of that cargo and come back and take on 500 tons and then make another discharge and take some other coal on; until all of the coal was removed from the barge it would be impossible to tell there was an overage, and the quantity of overage; is that true? A. Yes.

Mr. McCUTCHEN.—Do we understand that the witness is testifying to that of his own knowledge or just agreeing with [326—272] you?

Mr. ROCHE.—You are testifying to that from these records, are you not?

A. The records appear to show it.

Mr. McCUTCHEN.—Do I understand that the witness says that all that he said appears in this book?

A. All of that is said in this record, from which this is compiled from.

Mr. ROCHE.—Q. That is with the exception of that exact quantity I have given you.

A. In other words, it does not state those words,

(Testimony of W. H. Tidwell.)

but it sets forth the quantities.

Q. Go right ahead?

A. Under date of January 30th the barge "Ruth" received, at least the date of the cleanup, the barge "Ruth" received 195 tons, 1419 lbs. from the steamer "Thor."

Q. On what page are you reading? A. Page 79.

Q. Under date of January 30th?

A. She also received from the offshore bunkers, 558 tons, 1970 lbs.; from the offshore bunkers, 6 tons, 60 lbs.; the offshore bunkers, 56 tons, 240 lbs., or a total of 816 tons, 1440 lbs.

Q. Just one minute; what was the number of the drawback upon which a claim was presented to the United States Government and upon which duties were returned by the United States Government to the Pacific Mail Steamship Company?

A. Drawback entries Nos. 62, 64 and 66; 62 being the "Peru"; 64 being the "San Jose," and 66 the "City of Para."

* * * * *

Q. Suppose you take Exhibit "C"; that Exhibit "C," as you already have testified, correctly sets forth the entries in so [327—273] far as they related to the barges; is that correct? A. Yes.

Q. In other words, they show the coal laden upon each barge which was laden with coal upon dates between April 1st, 1906, and the last of December, 1912? A. January 1st, 1906.

Q. From January 1st, 1904?

A. No, this shows from January 1st, 1906. There

(Testimony of W. H. Tidwell.)

is a different statement showing 1904 and 1905.

Q. Between January 1st, 1906, and the 31st of December, 1912, and the place from which the coal was taken which was laden upon the barge?

A. Yes. I think this one goes to November 20th, 1912, for the reason that no drawback was paid after that date; the payment of drawbacks was discontinued at that time.

Q. I direct your attention to drawback No. 62, and ask you to look at it and if you will make a comparison between the figures in that drawback and the table which you now hold in your hand, Exhibit "C," and find the entries relating to that drawback claim.

A. Entry for drawback for 275 tons of coal which is alleged to have been laden on the steamship "Peru," which arrived at this port on the steamer "Harpeake" December 17, 1910, custom-house entry No. 16,806.

Q. Now, by whom was that drawback claim made?

A. The claim was made by the Pacific Mail Steamship Company by J. S. Mattoon, Attorney in Fact.

Q. Will you turn to the table which you have in your possession at this time and state what entries appearing in that table, Exhibit "C," relate to that drawback concerning which you have just testified?

A. On this particular entry it is only for 275 tons. From the barge "Ruth" there [328—274] was laden on the steamer "Peru"—

Mr. McCUTCHEN.—Q. What page are you reading from?

A. Page 59. There was laden on the steamer

(Testimony of W. H. Tidwell.)

“Peru” 295 tons, 1062 lbs. There is a discrepancy here of 20 tons on this particular drawback entry, which will be taken up on some other entry on the same steamer.

Mr. ROCHE.—Q. How do you mean—that there was another claim for that?

A. There would be more than one claim in many instances for one vessel. It will go over for sometimes two or three weeks or a month, and the balance will be taken on some other claim.

Q. Now, I direct your attention to the entry of the steamer—

A. (Intg.) Just one moment.

Mr. KNIGHT.—That figure of the steamer “Peru” there on page 59 should according to the diary be 275 instead of 295.

The WITNESS.—Yes, I was just figuring that at the present time. 275 tons, 1062 lbs., instead of 295 tons.

Mr. ROCHE.—Q. Refer for just a moment to the table which you have in your hand at page 59; that entry appears opposite the date January 30th, does it not?

A. January 30th, and this item should be 275 tons, making a total of 883, which is merely a clerical error in the figure.

Q. In other words, there was a cleanup on the barge on the 30th of January, 1911; is that correct?

A. The barge “Ruth.”

Q. That was the date upon which there was a cleanup on the barge “Ruth”; in other words, whatever coal she had on her was completely discharged?

(Testimony of W. H. Tidwell.)

A. Yes.

Q. She had taken upon her from the time of the previous [329—275] cleanup between that date and the 30th of January, 1911, how much coal in tons and lbs.? A. You mean the barge "Ruth"?

Q. The barge "Ruth"? A. 816 tons, 1440 lbs.

Q. That represents, Mr. Tidwell, so that the jury may understand it, the total amount of coal laden upon that barge between the date of the previous cleanup and the 30th of January, 1911, which was the next cleanup. A. That is true.

Q. And upon which date the overage, if there was any overage, was determined; is that correct?

A. Yes.

Q. Now, then, will you indicate to the jury from the table which you now hold in your hand or which you have in your possession and which represents the entries contained in the defendant Mills' book, what quantity of coal is laden from time to time upon the barge "Ruth" between the date of the previous cleanup and the 30th of January, 1911? * * *

A. From the offshore bunkers the barge "Ruth" received 558 tons, 1970 lbs.; from the offshore bunkers, 6 tons, 60 lbs.; the offshore bunkers, 56 tons, 240 lbs.; from the steamer "Thor" 195 tons, 1410 lbs.; or a total of 816 tons, 1440 lbs.

Mr. McCUTCHEN.—What was the date of that?

A. January 30th, page 59.

Mr. ROCHE.—Q. January 30th is, as you have already testified, the date of the cleanup?

A. The date of the cleanup.

(Testimony of W. H. Tidwell.)

Q. So that it was laden with coal upon four different occasions; is that correct? A. That is true.

Q. Upon each one of those occasions she received the amount of coal to which you have just testified?

A. Yes. [330—276]

Q. Making a total of 816 tons, 1440 lbs.; is that true? A. That is true.

Q. Now, will you state to the jury from the table, Exhibit "C," which you have in your possession, the disposition which was made of that 816 tons, 1440 lbs., and such additional coal as may have represented an overage?

A. On the steamer "Peru" there was laden according to the figures here 295 tons, 1062 lbs., which is an error; it should be 275 tons, 1062 lbs. On the steamer "San Jose" 317 tons, 222 lbs.; the "City of Para" 290 tons, 1432 lbs., making a total of 883 tons, 476 lbs., which was 66 tons, 1276 lbs. more than she had taken on board.

Q. Now, let me ask you this question, Mr. Tidwell: Of course, this represents foreign coal, as you have already testified?

A. In every instance; these exhibits only deal with foreign coal.

Q. Now, you have testified that between the date of the previous cleanup and the 30th of January, 1911, this barge took on 558 tons, 1970 lbs. from the offshore bunkers on one occasion, 6 tons, 60 lbs. on another occasion from the same bunkers, 56 tons, 240 lbs. from the same bunkers upon another occasion and 195 tons, 1410 lbs. from the steamship "Thor," aggre-

(Testimony of W. H. Tidwell.)

gating in all 816 tons, 1440 lbs. Was that what is known as the out-turn or ascertained weight upon which the Government of the United States received duties? A. Yes.

Q. In other words, so far as that coal is concerned, the Government was paid duty only upon 816 tons, 1440 lbs.? A. That is true.

Q. Now, each one of these boats, the "Peru," the "San Jose" and "City of Para" were American registered boats, were they not? [331—277]

A. Yes. Belonging to the Pacific Mail.

Q. Boats flying the American flag operated by the Pacific Mail Steamship Company? A. Yes.

Q. And foreign bound, is that correct? A. Yes.

Q. Now, as you have already testified, those 816 tons, 1440 lbs. of coal were subsequently laden, or was laden rather in those three boats?

A. On those three vessels, yes.

Q. And from the 816 tons, 1440 lbs., there was laden on the steamship "Peru" 275 tons, 1062 lbs.; into the steamship "San Jose" 317 tons, 222 lbs., and into the "City of Para" 290 tons, 1432 lbs.; is that correct? A. That is true.

Q. In other words, there was 66 tons, 1276 lbs. more coal put into the boats than had been checked out on the barge? A. Yes.

Q. And 66 tons, 1276 lbs. more coal laden into these three boats than upon which the Western Fuel Company had paid duties to the United States Government; is that correct? A. Yes.

Q. Now, is it also a fact, Mr. Tidwell, that for the

(Testimony of W. H. Tidwell.)

whole 883 tons, 476 lbs., representing 66 tons, 1276 lbs. more coal than upon which the Western Fuel Company had paid import duty, drawback claims were presented by the Pacific Mail Steamship Company against the United States Government?

A. Yes, and were paid.

Q. And were paid? A. Yes.

Q. In other words, so far as that transaction is concerned, the Government paid back, representing import duties, the duties upon 66 tons, 1276 lbs. more coal than upon which duties were paid in the first instance to the United States Government; is that correct? A. That is correct.

Witness continuing: There was 816 tons, 1440 lbs. of coal laden into the barge. The Government paid a drawback on 883 tons 476 lbs., which was 66 tons 1276 lbs. more than was in the barge. I got that from the Mills book which shows that all of the coal was laden into the "Peru," the "San Jose" and the "City of Para." The "Peru" is referred to on drawback 62, the "San Jose" on 64, and the "City of Para" on 66. It is a fact that the drawback claims presented by the Pacific Mail Steamship Company against the United States were for the return to it of duties on 66 tons 1276 lbs. more coal than was taken into this barge, as supported by the affidavits of some officials of the Western Fuel Company. That will be shown by the entries themselves. My answers simply refer to this particular transaction here of the "Ruth" and these other vessels. [332—278]

* * * * * * * *

Mr. ROCHE.—Q. You have a claim there before

(Testimony of W. H. Tidwell.)

you, haven't you?

A. Yes, the drawback.

Q. I call your attention to two other drawback claims, and ask you whether the other two drawback claims represent the two drawback claims to which you have testified and which are indicated in that table?

A. One represents the "Peru," No. 62, for 275 tons; the other, No. 64, the steamer "San Jose," 317 tons, 222 lbs., which will probably be liquidated as 317 tons, not using the fraction; and No. 66 represents the "City of Para" for 291 tons.

Q. Now let me have them. I want to direct the jury's attention to some things appearing on each one of these drawbacks. Each of these drawback claims disclose, do they not, Mr. Tidwell, that the coal represented by the claim was originally imported into this country by means of the "Harpeake"?

A. In two instances only.

Q. The other is by the—

A. (Intg.) The "M. S. Dollar."

Q. I direct your attention to entry No. 1, 16,806, and ask you if that is the entry indicated upon two of these drawbacks?

A. That is the steamer "Harpeake," and on the face of the entry you will find the numbers of these particular drawback entries.

Q. In other words, that entry relates to the two of these drawback claims, each claim being made for the return to the claimant of duty paid to the United States Government upon the importation of this coal

(Testimony of W. H. Tidwell.)

in the steamship "Harpeake"; is that correct?

A. That is correct. You will find entry No. 62 and entry No. 64 referred to on this [333—279] sheet which has been presented by the Western Fuel Company.

Q. Or by the Pacific Mail Steamship Company?

A. No, that is the Western Fuel Company's statement.

Mr. ROCHE.—I desire to read to the jury, may it please the Court, the affidavit of the defendant James B. Smith, which is upon this.

The COURT.—Is it a document that is in evidence?

Mr. MOORE.—The signature to that affidavit is admitted, and I think it is in evidence.

Mr. ROCHE.—Yes. This is one of the entries that is already in the evidence, the affidavit of James B. Smith upon this document, upon which among other things, appear the references to these drawback claims: "Pacific Mail Steamship Company, Certificate of Delivery of Imported Merchandise, Port of San Francisco, February 10, 1911. Description of merchandise, coal. By whom imported: Western Fuel Company. How imported: Steamer 'Harpeake.' When imported: December 17, 1910. Where imported: San Francisco. Whence imported: Newcastle. Quantity: 2337 tons. Value: \$9,348. Rate of duty paid: 45 cents. Entry No. 16806. Bond No." blank. Under remarks, among other things appears in red ink the reference to these two drawback claims, one being numbered 62 and the other 64,

(Testimony of W. H. Tidwell.)

and of course upon this affidavit appear a number of other references to a number of other drawback claims. Is that correct, Mr. Tidwell?

A. Yes.

Mr. ROCHE.—Opposite 62 appear the following: January 17, 62, entry number, 275 tons. I direct the jury's attention to drawback claim 62, which is a drawback claim for 275 tons at the rate of 45 cents; January 24th, entry No. 64, tons 317. [334—280] I direct the jury's attention to the drawback claim already referred to by the witness No. 64 for 317 tons.

“I, James B. Smith, Vice-President and a stock-holder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damages or any other cause, except as herein set forth, and that the said merchandise has been delivered to Pacific Mail Steamship Company between December 19th to December 24th, 1910, and that no other certificate of delivery covering the above merchandise has been issued by me. James B. Smith, Importer. Sworn to before me this Feb. 10, 1911, Geo. H. Probasco, Notary Public in and for the City and County of San Francisco, State of California. Commission expires April 14, 1913.”

Now, directing your attention to the remaining drawback claim which has already been referred to by you indicating that a certain quantity of coal, 291

(Testimony of W. H. Tidwell.)

tons of coal, was imported in the steamship "M. S. Dóllar," which is the remaining entry in the item to which you have already testified, I will ask you to look at that end and state what number represents the number of the entry of that steamship "M. S. Dóllar"?

A. No. 788, date of importation January 12, 1911.

Q. Now, I direct your attention to what purports to be a consumption entry and ask you whether that is the entry? A. Yes. [335—281]

Q. Let me have that drawback claim. Now, reading from a part of the drawback claim itself, it contains the following language:

"I do solemnly, sincerely and truly declare that the coal described in the within entry and now at vessel is intended to be used for fuel on board the above-described vessel and not to be relanded at any place or port within the United States, and that all of said coal was duly imported and that the duties thereon were paid at the port of San Francisco on or about 13th day of January, 1910. J. B. MILLARD."

The WITNESS.—That is J. S. Mattoon.

Mr. ROCHE.—It may be Mattoon.

Now, I direct the attention of the jurors to the affidavit of the defendant, James B. Smith, which accompanies this entry: "Description of Merchandise: coal. By whom imported: Western Fuel Company. How imported: Steamer 'M. S. Dollar.' When imported: January 12, 1911. Where imported: San Francisco. Whence imported: Nanaimo. Quan-

(Testimony of W. H. Tidwell.)

tity: 2976 tons. Value, \$11,904.” I am reading in the tons and dollars because I assume that is what it means. “Rate of duty paid 45 cents. Entry No. 788. Bond No.” blank. Under the remarks’ column appears in red ink two entries. I will read both of them. “1911, Entry No. Tons. January 13, under the figures 1911. Entry No. 61. Tons, 2685. January 26, entry No. 66, 291 tons, making a total of 2976 tons.

Q. It is a fact, is it not, that these figures in red ink, so far as they relate to Entry No. 66, 291 tons, indicate the same number of tons as is set forth in that drawback claim? [336—282] A. Yes.

Mr. ROCHE.—

“I, James B. Smith, Vice-President and stockholder Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause except as herein set forth, and that the said merchandise has been delivered to Pacific Mail Steamship Company between January 13th to January 17, 1911, and that no other certificate of delivery covering the above merchandise has been issued by me. James B. Smith, Importer. Sworn to before me this February 10, 1911. Geo. H. Probasco, Notary Public in and for the City and County of San Francisco, State of California.”

Q. As I understand your testimony, Mr. Tidwell,

(Testimony of W. H. Tidwell.)

the United States Government did return or did pay to the Pacific Mail Steamship Company duty upon the entire quantity of coal represented by these three claims; that is correct? A. Yes.

Q. Which, as you have already testified, amounted in quantity to 66 tons in excess of the amount of coal upon which duty was paid? A. Yes.

* * * * * * * *

Q. You were testifying yesterday afternoon, Mr. Tidwell, at one time upon direct examination, about percentages so far as the shortages appearing in the books of the defendant Mills and appearing in these various documents which have heretofore been introduced in evidence between the entire amount of coal [337—283] actually imported by the Western Fuel Company into this port, including partial cargoes which you have already testified you returned at the ascertained weight and the bill of lading or invoice weight; now, I will ask you whether, since court adjourned, and under your supervision, there was an estimate made of the percentage of shortage, taking into consideration the cargoes alone contained on this boat in which a shortage occurred; that is, when I say “a shortage,” I mean a difference between the bill of lading or invoice weight and the amount of the out-turn weight? A. Yes, sir, there has been.

Q. I direct your attention to a statement appearing in lead pencil, and ask you whether that is the calculation showing that percentage?

* * * * * * * *

Mr. ROCHE.—Q. Just give the totals now, Mr. Tidwell.

(Testimony of W. H. Tidwell.)

A. This shows a total invoice weight of 1,413,600 tons—

Q. (Intg.) Before you leave that, Mr. Tidwell, that represents the total tonnage represented by the invoice or bill of lading weight of those cargoes which turned out short at this port?

A. Yes, sir. The total shortage was 26044 tons, 877 lbs.

Mr. OLNEY.—Q. What was the ascertained weight?

Mr. ROCHE.—The ascertained weight would be the difference between the shortage and the weight. He has not reached the discharge weight just yet.

A. (Continuing.) While it is not shown on this sheet, the ascertained weight would be 26044 tons, 877 lbs., less than the invoice weight; the percentage of shortage is 1.84.

Q. Directing your attention to Table A, which has been introduced in evidence as part of “U. S. Exhibit No. 125,” while [338—284] we are talking about percentages you have of course come in contact—each instance being represented upon that table—with a number of shortages, have you? A. I have.

The witness here continued with the presentation Exhibit No. 125 Table A,” with the intention that he should testify to and point out to the jury some of the more prominent shortages on foreign coal imported by the Western Fuel Company into the United States between April 1st, 1906, and December 31st, 1912; a separate table having been prepared for the period January 1st, 1904 to April 1st, 1906.) Table A shows the following prominent shortages:

(Testimony of W. H. Tidwell.)

On page 1, in the month of May, steamer "Turge Viking," invoice weight 5710 tons; ascertained weight 5544 tons 1080 pounds; a shortage of 165 tons, 1160 pounds, or a percentage of shortage of about 3 per cent.;

The steamer "Reidar," also on page 1 of Table A; invoice weight, 5810 tons; ascertained weight 5668 tons, 770 pounds; shortage 141 tons, or a little over 2 per cent;

On page 2 of Table A, steamer "Titania," invoice weight 5655 tons; ascertained weight 5554 tons, 880 pounds; shortage 100 tons, 1360 pounds;

"Turge Viking," on same page of Table A; invoice weight, 5700 tons; ascertained weight 5515 tons, 790 pounds; shortage 184 tons, 1450 pounds, or a percentage of shortage in excess of 3 per cent.

The witness here continued with the presentation to the jury of similar shortages appearing in said "United States Exhibit No. 125, Table A," [339—285] reading off in each case the name of the vessel; the date of her discharge; the page of Table A upon which the entry appears; the invoice weight; the ascertained weight; the shortage in tons, and the shortage in percentages. The vessels referred to and the percentage of shortage are as follows, all occurring, of course, within the period April 1st, 1906, to December 31st, 1912:

"Titania," approximately 2% ;

"Turge Viking," over 4% ;

"Tellus," about 4½% ;

"Tordenskjold," about 3½% ;

(Testimony of W. H. Tidwell.)

The witness here remarks that there are a number of shortages in the table which are below the percentages to which he has above testified, and also that there are some cases of overages. Continuing with the names of the ships and percentages of shortage, as appearing in Table A, he gives the following data :

“Sheila,” approximately 2% ;

“Hercules,” about $2\frac{1}{2}\%$;

“Sheila,” a little in excess of 2% ;

“Tellus,” about 3% ;

“Wellington,” about 3% ;

“Tordenskjold,” about 5% ;

“Tordenskjold,” about $4\frac{1}{2}\%$;

“Hazel Dollar,” about 7% ;

“Titania,” a little more than 4% ;

“Jethon,” about 4% ;

“Tordenskjold,” approximately 5% ; [340—
[286]

“Finn,” (this is a case of an overage of 38 tons,
1940 pounds—the only instance of an
overage in the month involved) ;

“Tordenskjold,” between 5 and 6% ;

“Bessie Dollar,” about $6\frac{1}{2}\%$;

“Hornelen,” about 5 or $5\frac{1}{2}\%$;

“Bankfield,” about $\frac{1}{2}$ of 1% ;

“Indra,” about $3\frac{1}{2}\%$;

“Marcellus,” about 7%.

Q. By the way, before referring to any other entries, it is a fact, is it not, Mr. Tidwell, that the duties paid the United States Government upon the discharge of this coal were paid upon what you have

(Testimony of W. H. Tidwell.)

testified to be the ascertained weight?

A. Yes, sir.

Q. And not on the invoice or bill of lading weight?

A. No, sir.

Q. Now, turning back to Table C, which you have in your possession, Mr. Tidwell, does that table cover all of the entries appearing in the defendant Mills' books, between January 1, 1906, and the latter part of 1912?

A. No, sir; not all of the entries.

Q. I mean all of the entries in so far as they relate to coal being laden upon barges, and the discharge of those barges?

A. It relates merely to the out-turn of barges on which there were overages.

Q. Have you figured up some of the percentages showing the quantity of coal, the percentage of coal represented by the overage, compared with the quantity of coal checked into the barge?

A. You mean the totals?

Q. Yes? A. Yes, sir; about 6 per cent.

Q. Just indicate to the jury, if you will, Mr. Tidwell, what you mean by the total representing approximately 6 per cent?

A. There was laden in the barges from January 1, 1906, to November [341—287] 20, 1912, according to the books kept by Mr. Mills, 563,759 tons, 724 pounds; there was discharged from the barges during the same period 596,928 tons, 1266 pounds, a difference of 33,223 tons, 542 pounds, which was discharged from the barges more than had been laden therein;

(Testimony of W. H. Tidwell.)

the percentage is based upon the amount alleged to have been laden into the barges and the amount—the difference between the amount laden into them and the amount discharged, making a percentage on the totals of about 6 per cent, approximately 6 per cent.

Q. That is a 6 per cent overage?

A. A 6 per cent overage.

Q. Now, let me get at that in another way: You say there were checked into or laden upon these barges during the period of time you have referred to, 596,982 tons, 1266 pounds; is that correct?

A. That is true—no, that is not correct, Mr. Roche; there was laden on the barges 563,759 tons, 724 pounds, and there was discharged 596,982 tons, 1266 pounds.

Q. From what page are you reading, Mr. Tidwell?

A. Page 80 of Table C.

Q. According to your testimony, Mr. Tidwell, the total number of tons laden upon these barges or checked upon these barges, according to the books of the defendant Mills, between January 1, 1906, and November 20, 1912, would be 563,759 tons, 724 pounds? A. That is true.

I have made myself familiar with the books, documents and records of the Western Fuel Company, which have been turned over to me, including the books kept by Mr. Mills. I have also made myself familiar with some of the records, the production of which depended upon the accuracy of the figures kept by Mr. Mills. The books kept by Mr. Mills showed the disposition [342—288] of all incoming

(Testimony of W. H. Tidwell.)

coal which was not laden upon the barges; in other words, of all the coal discharged from boats or vessels in which coal is imported at the port of San Francisco, the books being based upon the ascertained weight.

Q. In other words, simply to direct your attention to a concrete case for the purposes of illustration, if from the steamship "Thor" there would be discharged 5,000 tons, and that 5,000 tons would represent the ascertained weight, that is, the discharge or out-turn weight, even though the invoice or bill of lading weight might be much greater or in excess of that quantity of coal, or that weight of coal, the books kept by the defendant Mills would show what quantity of that coal was discharged into the yard of the Western Fuel Company, what portion of that coal went into the offshore bunker, and what portion of that coal was discharged into what is known as the inshore bunker, which would feed local distribution; that is correct, is it not?

A. That is true.

Q. And using that same case for the purpose of further illustration, if from that 5,000 tons of coal 2,500 tons would be discharged into the inshore bunker, 1,000 tons into the yard, and the remaining 1,500 tons into the offshore bunker, that would be the weight of the coal upon which duties would be paid to the United States Government? A. Yes, sir.

Q. These barges would draw their coal, ordinarily, would they not, from the offshore bunker?

A. Yes, sir, from the offshore bunker.

(Testimony of W. H. Tidwell.)

Q. You are familiar, are you not, with the records kept by Mr. Mills from time to time, showing, for instance, that a barge received a certain quantity of coal from a particular steamship, say the steamship "Thor"? A. Yes, sir. [343—289]

Q. Is it your understanding of the system that so far as that quantity of coal is concerned it would, after being weighed, be dumped into one of the compartments of the offshore bunker and go right through it into the barge?

A. It would be shot right through into the barge, according to my understanding of it.

Q. So, in that particular instance, instead of charging that particular quantity of coal into a compartment or a pocket of the offshore bunker, or to the offshore bunker, itself, it would be charged directly to the barge, itself, as though laden out of the ship on to the barge; is that correct?

A. That is my understanding.

* * * * *

Q. Is it not a fact, Mr. Tidwell, that according to the books kept by the defendant, Mills, 33,223 tons, 542 pounds more of coal was taken out of these barges than the quantity of coal upon which the United States Government collected import duties?

* * * * *

A. Yes, sir.

Q. And the 6 per cent to which you referred, or approximately the 6 per cent to which you referred, represents the excess coal, does it not, that is, the percentage of coal representing overage that was

(Testimony of W. H. Tidwell.)

checked out or discharged from these barges in excess of the amount of coal that was checked in?

A. That is true.

Q. That 6 per cent is based upon every ton of coal that, according to the books of the defendant Mills was checked into these barges during these years to which your attention has heretofore been directed?

A. On which there was an overage. [344—290]

Q. Upon which there was an average?

A. Yes, sir.

Q. It is the fact, is it not, Mr. Tidwell, that there was an overage practically in every instance?

A. Yes, sir.

Q. And it is also a fact, is it not, that at least in one instance there was an overage of some 70 per cent?

A. I think, correctly speaking, it is about 68 per cent.

(The witness' attention is here directed to "United States Exhibit No. 125, Table C.")

The dates over on the extreme left-hand side of Table C represents the cleanup of the barge, that is, when all of the coal that remains in the barge was taken out of it. In the next column, moving to the right, is the name of the barge. The names following the name of the barge represent vessels or places from which coal was received. For instance, page 1 of Table C, the first item is "Melrose"; that represents the name of the barge "Melrose." The name "Tellus" represents a ship from which the coal was taken which was laden into

(Testimony of W. H. Tidwell.)

the "Melrose." My understanding of that particular instance is that it is supposed to represent a case where the coal is taken out of the "Tellus" and discharged via one of the offshore pockets immediately upon the barge. The next column, under the word "debit," which showed the individual loading from the various ships under "tons and pounds" is inserted the total amount laden upon the barge. The figures in the next column represent the drawback entry number, and then comes the name of the vessels under the general designation "Vessel," which represents the vessel on which the coal was laden which got the benefit of the drawback. The figures appearing immediately to the right of the names of the vessels represent the quantity of coal laden upon or discharged into each of these vessels. Under the column entitled "Credit" where [345—291] "Tons and Pounds" appear, is placed the total. Under the next column "Without drawback" appears the coal upon which no drawback was claimed because of the character of the boat in which the coal was discharged. The next column, which is designated "With drawback," represents that portion of the coal which was discharged upon vessels upon which drawback claims were made and paid.

Q. Now, directing your attention to the second item appearing upon page 954 of the transcript in this case, which would be upon page 1 of the table or exhibit, the barge "Ruth," upon the barge "Ruth," a certain quantity of coal was laden; is not that true? A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Just explain that item, if you will, please.

A. Under date of January 5, the barge "Ruth" received from the steamer "Turje Viking" 746 tons, 840 pounds.

Q. That quantity of coal represents the ascertained weight, does it?

A. It represents the amount laden on the barge, according to the books of Mr. Mills.

Q. And according to the ascertained weight?

A. Yes, sir.

Q. And the weights, according to his books, upon which duties were paid? A. Yes, sir.

Q. What became of that coal?

A. The 746 tons and 840 pounds were laden on the steamers "Korea," "City of Sydney," and "Peru"; the "Korea" receiving 139 tons, 841 pounds; the "City of Sydney" receiving 315 tons, 987 pounds, [346—291½] and the "Peru" receiving 392 tons and 1200 pounds, making a total of 847 tons, 794 pounds, or 100 tons, 2194 pounds more than were laden on the barge.

Q. In other words, although there were only 746 tons and 840 pounds checked in or laden upon that barge, there were discharged from that barge and laden upon these three ships, 847 tons, 794 pounds, or 100 tons, 2194 pounds in excess of the amount checked in; is that correct?

A. Yes, sir, that is correct.

Q. Upon what quantity of coal were drawbacks paid? A. On all of it.

Q. That is, on the entire coal laden into these

(Testimony of W. H. Tidwell.)

three ships, including the 100 tons overage; is that correct?

A. Yes, sir, paid on drawback entries 70, 75, and 77.

Q. By the way, what is that percentage of overage, approximately? A. About 13 per cent.

Q. About 13 per cent increase? A. Yes, sir.

Mr. ROCHE.—Q. I would like to have you look at this diary. Will you turn to the diary kept by the defendant Mills and to that entry; I want to find out over what period of time that barge took on that coal; in other words, for the purpose of determining within what period of time the coal was checked in or laden upon that barge, that it increased 13 per cent. You don't know, of your own knowledge, what the condition of the climate was here during that period?

A. No, I was not here at that time. It will be necessary to have the book of 1905, if that is the day of the cleanup.

Q. The date of 1906? A. I know.

Q. If the cleanup was 1906, it would start in at 1905? A. That is right.

Mr. KNIGHT.—You assume in your question that every time [347—292] there was an overage shown it was a cleanup of the barge.

Mr. ROCHE.—That is what I assume. Here is the last week in December, Mr. Tidwell.

A. On December 26, 1905, there was laden on the barge "Ruth" from the steamer "Turje Viking" 282 tons, 680 lbs. The same amount is shown on

(Testimony of W. H. Tidwell.)

December 27. The same amount is shown on December 28, the same on December 29. On December 30th there was laden on to the barge "Ruth" 746 tons, 840 lbs.

Q. Now, just a minute, Mr. Tidwell. When you say there was laden upon the barge "Ruth," do you mean that on that date that represents the total number of tons which had been laden on her up to that date?

A. The total amount up to that date, yes. That was all that was laden on the barge "Ruth" from the steamer "Turje Viking."

Q. In other words, that 746 tons, 840 lbs. to which you have just referred includes these various amounts to which you have heretofore testified to as having been laden upon the barge from and including December 26th to and including December 30th; is that correct? A. Yes.

Q. So that that quantity was being deposited upon that barge during six days; that is, from and including the 26th of December to and including the 30th—I mean five days? A. Five days.

Q. Now, when did she first commence to discharge?

A. On December 27th she discharged in the steamer "Korea" 139 tons, 840 lbs.

Q. That would be the first entry appearing in your "Exhibit C" relating to that item.

A. Steamer "Korea," yes; 139 tons, 840 lbs. On December 29th she discharged into the "City of Sidney" 135 tons, 2060 lbs. She continued to dis-

(Testimony of W. H. Tidwell.)

charge into the "City of Sidney," and on December 30th it [348—293] shows that she had discharged 315 tons, 987 lbs.

Q. That represents, of course, the second item contained in these entries appearing upon page 1 of Table C? A. 315—987.

Q. That makes the total quantity of coal discharged upon that occasion from the barge "Ruth" into the "City of Sidney." A. Yes.

Q. Now, when did she continue to discharge?

A. She continued to discharge on January 4th; she discharged into the steamer "Peru" 116 tons, 1666 lbs.

Q. And on the 5th?

A. On the 5th into the "Peru," a total on the 5th—into the "Peru," making a total of 392 tons, 1206 lbs.

Q. Does the book itself kept by the defendant Mills show the quantity of coal discharged from that barge upon that occasion in excess of the amount checked in or laden upon the barge? A. It does.

Q. What do the figures show, kept by Mr. Mills?

A. It is all on December 5th, the whole thing is itemized here, showing that the barge "Ruth" received from the steamer "Turje Viking," voyage No. 4, 746 tons, 840 lbs.; that she discharged into the steamer "Korea," 139 tons, 841 lbs.; the "City of Sidney," 315 tons, 987 lbs.; the "Peru," 392 tons, 1206 lbs., making a total of 847 tons, 794 lbs., or 100 tons, 2195 lbs. more than she had in her.

The COURT.—The answer to your question is

(Testimony of W. H. Tidwell.)

that all this occurred between the 26th of December and the 6th of January?

Mr. ROCHE.—Yes.

* * * * *

[349—294]

Q. Directing your attention to the question of overage, so far as this item is concerned, it is true, is it not, that the overage of 100 tons, 2194 lbs. is indicated in this book kept by the defendant Mills, in the following language and figures: “Over 100—2194.”

Mr. McCUTCHEN.—I suggest, if your Honor please, in the interest of saving time,—if they think it proper to consume time, of course, we have no objection—the witness has already stated that in every instance where there is an overage the books of Mr. Mills indicate that overage which is also stated in the total overages cast up by the witness from these books. That has been stated two or three times. It seems to me it is a waste of time to continue to harp on that before the jury.

Mr. ROCHE.—If your Honor please, counsel on the other side are always endeavoring to interject into this case a false quantity, and that is the percentage that these overages bear to the total volume or quantity of business done by the defendants, and, of course, upon that theory a man could commit a fraud against the Government continuously during one month, and if he had not done anything of that kind before that date, he could come before a jury and say that the quantity of overage during this

(Testimony of W. H. Tidwell.)

one month during which I did commit frauds were so small as compared with my good faith extending over a long period of years that I ought not to be convicted of a criminal offense. We desire to have the jury understand the particular overages with reference to the particular cases for the purpose of demonstration.

Mr. MOORE.—Counsel has made an argument and we would like to be accorded the privilege of responding briefly. We resent the imputation that percentages have no bearing in this [350—295] matter. They simply confine themselves to showing 20,000 tons, as being the difference we will say, between the invoice weights down in this harbor of the imported coal and the custom-house weights. We think that a fair and honest table would have included, and a full and fair examination as to that matter would have included the proposition that that only amounts to nine-tenths of one per cent, because we think when the jury sees that this only amounts to nine-tenths of one per cent on the volume of business transacted by the company, it will appear at once ridiculous and absurd that there was any conspiracy involved in connection with it at all. And just so with respect to the matter of these drawbacks as to which we do not believe any examination has yet been had that puts the situation completely before this jury, where you are going back over a period of six years relating to the importation of over 2,000,000 tons of coal weighed upon one method upon its arrival here, weighed and sold by

(Testimony of W. H. Tidwell.)

another method, so far as a small proportion of it is concerned, amounting to less than one-fifth of the total amount of coal that is consigned from the vessels, when they can only by adding up the six years in a case where one million dollars and over of duty has been paid by this company, they can only figure out of the difference in weight made and conducted by the Government officials of the United States themselves, and without any control or connection upon the part of this company, only an item of \$12,000, which was not collected by this company at all, but was collected by another company which in order to get 45 or 50 cents per ton for the duty had to pay six or \$7.00 per ton for the coal; that when the slight percentage of \$12,000 in that million dollars, is concerned, running, as it does, over a course of business extending— [351—296]

The COURT. (Intg.) There is no occasion to prolong this argument.

* * * * *

Mr. ROCHE.—Q. Will you turn to Exhibit “C” again, Mr. Tidwell; I would like to have you turn to an entry appearing during the month of December, 1911—December 4, 1911, is my recollection of it, that the barge cleared. A. Page 67 of Exhibit “C.”

Q. I think it is well at this time, where we are paying attention to percentages, to direct attention to this item.

Mr. McCUTCHEN.—You mean the “Comanche”?

The WITNESS.—December 4th, the “Comanche.”

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Q. Will you refer to that item, Mr. Tidwell? A. This was December 4th.

Q. Yes, that is the one; it is the “Comanche,” December 4th. Will you read that item to the jury?

A. December 4, 1911, barge “Comanche”; the barge “Comanche” received from the steamship “Thor” 302 tons, 579 lbs.; the offshore bunkers, 96 tons, 1760 lbs.; the offshore bunkers, 24 tons, 390 lbs.; the steamer, or the vessel, rather, “James Smith,” 212 tons, 1160 lbs., and the offshore bunkers, 90 tons, making a total of 725 tons, 1649 lbs.

Q. That was the coal checked in upon the barge; is that correct? A. Yes.

Q. And that was upon ascertained weight, the weight upon which the Western Fuel Company paid to the United States Government import duty?

A. Yes.

Q. What became of that coal?

A. That was laden upon the vessel “J. N. Luckenbach”; 100 tons, 565 lbs.; the steamer “Kansas City,” 345 tons, 1692 lbs.; the steamer “Shinyo Maru,” 798 tons, 1770 lbs., making a total of [352—297] 1244 tons, 1766 lbs., or 519 tons, 117 lbs. more than she had on her.

Q. In other words, the coal laden, checked into that barge was 725 tons, 1649 lbs., and the amount checked out of her or discharged out of her exceeded that tonnage by 519 tons, 117 lbs.? A. Yes.

Q. According to the books of Mr. Mills?

A. Yes.

Q. What percentage would that overage repre-

(Testimony of W. H. Tidwell.)

sent? A. Approximately 68 per cent.

* * * * *

Q. There was some question raised this morning as to whether all of the coal upon which drawbacks had been paid had been accounted for, or whether upon all of the excess coal or any part of the excess coal any import duties had been paid. I want to direct your attention to another one of these daily sheets including the discharge report produced here by the defendants, signed by E. Mayer, and covering the discharge of the steamship "Thor" in the month of July, 1910, being an exhibit which as yet has not been testified to. You have seen that exhibit before, have you not? A. I have.

Q. Now, I direct your attention to a diary kept by the defendant Mills during the year 1910, and ask you to look at that diary, and particularly the dates in the month of July, 1910, for the purpose of ascertaining whether the figures contained in those daily reports are similar in kind to the figures contained in that diary.

A. Now, you refer to the daily sheets or the summary?

Q. Yes. Will you mark that, please, Mr. Clerk, as an exhibit? That will be "U. S. Exhibit No. 128 for identification." [353—298]

The COURT.—Is it in evidence already?

Mr. ROCHE.—This one is not yet in evidence, your Honor. I suppose, Mr. McCutchen, you will concede, will you not, that all of the data and figures contained upon this exhibit now marked "U. S. Ex-

(Testimony of W. H. Tidwell.)

hibit No. 128 for identification" are in the handwriting of the defendant Mayer?

Mr. McCUTCHEN.—Well, subject to correction.

Mr. ROCHE.—It represents the daily report in reference to the discharge of the steamship "Thor" on that voyage and likewise contains a summary sheet.

Mr. McCUTCHEN.—We will admit that subject to correction.

Mr. ROCHE.—All right.

Q. Can you find upon that record kept by the defendant Mills the day upon which the steamship "Thor" was first discharged or the date upon which coal was first taken out of her?

A. Under the date of July 21, 1910, appears the name of the steamship "Thor" having discharged 224 tons, 2170 lbs. in the yard bunker; the same day 113 tons, 1920 lbs. into the barge "Ruth," showing a total discharge of 338 tons, 1830 lbs. on that particular day.

Mr. ROCHE.—Now, I read to the jury a part of this exhibit already offered in evidence indicating or rather showing the daily report of the discharge of the steamship "Thor" on July 21, 1910. Total coal discharged—I won't read the different hoists—338 tons, 1830 lbs. To yard bunkers, 224 tons, 170 lbs.; to barge "Ruth," 113 tons, 1920 lbs. Total, 338 tons, 1830 lbs. Those figures, Mr. Tidwell, correspond, do they not, with the figures to which you have just testified? A. They do. [354—299]

Q. Now, turn to the second day's discharge, July 22d?

(Testimony of W. H. Tidwell.)

A. On Friday, July 22nd, 168 tons, 1570 lbs. to the wharf bunkers; 1100 tons, 460 lbs. to the yard bunkers; 17 tons, 140 lbs. to the offshore bunkers; 452 tons, 2090 lbs. to barge "Ruth," showing a total discharge up to that time of 1738 tons, 2020 lbs.

Q. Now, the figures which you have just given me are totaled—in other words, they include the discharge to date. A. The total of the two days.

Q. In other words, the system pursued by Mr. Mills so far as these entries are concerned is substantially this: If 270 tons were discharged, we will say, to the barge "Ruth," we will say on July 21st, 1910, that, of course, would appear in that book, being the first amount of coal laden upon that barge discharged from the steamship "Thor"; if upon the second day another 270 tons of coal was discharged from that steamship and laden upon the barge "Ruth," the second day would simply give the totals and show that 500 tons up to that time had been laden on that barge; is that correct? A. Yes.

Q. Now, I read in evidence to the jury, the daily report of the second day's discharge of the steamship "Thor." July 22d, 1910; total coal discharged on that day, 1400 tons, 190 lbs. To wharf bunkers, 168 tons, 1570 lbs.; yard bunker, 875 tons, 550 lbs.; to barge "Ruth," 339 tons, 170 lbs.; to offshore bunker, 17 tons, 140 lbs. The total figures being as follows: discharged—this will be to date—1738 tons, 2020 lbs. The total figures here correspond with the figures which you had just read? A. They do.

Q. Will you turn now to the next date of discharge? [355—300]

(Testimony of W. H. Tidwell.)

A. Saturday, July 23d, 418 tons and 60 lbs. to the wharf bunkers; 1935 tons, 2160 lbs. to the yard bunkers; 374 tons, 1800 lbs. to offshore bunkers; 452 tons, 2090 lbs. to the barge "Ruth," making a total discharge up to this date of 3181 tons, 1630 lbs.

Q. That is the total discharge, 3180 tons, 1630 lbs.

A. Yes.

Q. As a matter of fact no coal was laden into the barge "Ruth" upon that date, the total figures, so far as the "Ruth" being concerned or is concerned, being carried over from the preceding day.

A. The same as of July 22d.

Q. Now, I read to the jury daily report of July 23d, 1910. Total coal discharged, that is, on that date, from the four hatches, 1442 tons, 1850 lbs. To wharf bunkers, 249 tons, 730 lbs.; yard bunkers, 835 tons, 1700 lbs.; to offshore bunkers, 377 tons, 1660 lbs., making a total discharge on that date of 1442 tons, 1850 lbs., and making a total discharge of coal to that date, to and including that date, of 3180 tons, 1630 lbs.

The WITNESS.—That corresponds to the amount shown in the book.

Q. Will you turn to the next day in that diary?

A. The next day, Monday, July 25, 1910, 541 tons, 1360 lbs. to the wharf bunkers; 2889 tons, 340 lbs. to the wharf bunkers; 554 tons, 1240 lbs. offshore bunkers; 452 tons, 2090 lbs. to the barge "Ruth," a total of 4638 tons, 550 lbs. total to that date.

Q. How many tons total to that date?

A. 4638 tons, 550 lbs.

(Testimony of W. H. Tidwell.)

Q. It is a fact, is it not, Mr. Tidwell, that even up to and [356—301] including that date, no additional coal had been discharged upon the barge "Ruth," but that the total discharge shown upon July 22d has been carried forward to the 25th?

A. Yes. I believe it is July 22d—yes, it is July 22d.

Q. Now, I will read in evidence the report for July 25, 1910, showing the discharge of coal upon that date and the total discharge to that date. July 25, 1910, to wharf bunkers, 123 tons, 13 lbs.; to yard bunkers, 953 tons, 420 lbs.; to offshore bunkers, 375 tons, 1680 lbs.; total coal discharged on that date, 1456 tons, 1160 lbs., making a total of coal discharged to that date and inclusive of July 25th, 1910, 4638 tons, 550 lbs.

The WITNESS.—This total corresponds to that amount.

Q. I call your attention to July 26th. That is the last date of discharge, is it not?

A. Yes, it is the last day of discharge; 1238 tons, 870 lbs. discharged into wharf bunkers; 2889 tons, 340 lbs. into the yard bunkers; 882 tons, 40 lbs. into the offshore bunkers; 450 tons, 2090 lbs. into the barge "Ruth," making a total discharge of 5462 tons, 1080 lbs. A memorandum also appears, "Gone to Oakland at 1-15 P. M."

Q. Now, it is a fact, is it not, Mr. Tidwell, that the coal discharged on, all of the coal discharged on the 26th of July, 1910, was either discharged into the wharf bunkers or into the offshore bunkers?

(Testimony of W. H. Tidwell.)

A. According to the records.

Q. In other words, you can tell that by comparing the figures upon that date with the figures appearing in the diary on the preceding day; that is correct, is it not? A. Yes, it is.

Q. I will read in evidence the daily report for July 26, 1910 [357—302] showing the discharge from the steamship on that date; to wharf bunkers, 696 tons, 1130 lbs.; to offshore bunkers, 127 tons, 1040 lbs.; total coal discharged that day, 824 tons, 530 lbs. At the lower left-hand corner of this sheet the following is contained: invoice, 7359 tons. That is the invoice and bill of lading weight; isn't that correct?

A. Yes; that is not shown on here.

Q. The invoice weight is not shown in that book?

A. No.

Q. Discharged, 5462 tons, 1080 lbs., balance, 1896 tons, 1160 lbs. Now, that represents the supposed balance of coal on that boat at the time she finished discharging in San Francisco and proceeded as Mr. Mill's book would indicate, to the Oakland bunkers?

A. To Oakland.

Q. And that balance is ascertained by deducting the actual discharge according to the out-turn weights from the invoice or bill of lading weight? A. Yes.

Q. Let me ask you this question, Mr. Tidwell—is or is not it a fact that for every lb., that is, within 10 lbs. of coal discharged at the San Francisco port according to the out-turn weights the coal is fully accounted for?

A. Pardon me just a moment, I do not understand.

(Testimony of W. H. Tidwell.)

Q. Let me put the question in a different form. According to the record which you have in your hand, 5462 tons, 1080 lbs. of coal were taken out of this steamship "Thor" according to the out-turn weight?

A. Yes.

Q. Is or is not it a fact that all of that coal is accounted for? A. Yes.

Q. And the various places in which that coal was finally deposited is likewise accounted for? [358—303]

A. Yes; there is another item on the "Thor" which you have not noted there.

Q. What is that item?

A. It shows the "Thor" again showing the same amount shown in the total here except 1780 tons, 130 lbs. discharged in Oakland, making a total of 7243 tons, 1610 lbs. discharged from the ship; also showing a shortage of 116 tons, 630 lbs.

Q. That is a shortage on the entire cargo?

A. On the entire cargo.

Q. That shortage representing the out-turn weight deducted from the invoice or bill of lading weight?

A. Yes.

Q. Will you turn to Exhibit "A," please, for just a moment? I intend to do this in only this instance, I believe, for the purpose of determining the accuracy of these tables, and find the discharge of that steamship "Thor" in Table A. That table there, as you have already testified, was compiled from the invoice and bill of lading weights and also the out-turn weights. A. On page 27.

(Testimony of W. H. Tidwell.)

Q. Of Table A.

A. The Table A, in the month of July, the second item, invoice weights, 7359 tons, ascertained weight 7242 tons, 1610 lbs.; short 116 tons, 630 lbs.

Q. Does the shortage which appears to have occurred as shown by the figures in Table A compare exactly with the shortage shown in the book of the defendant Mills?

A. It is short, 116 tons, 630 lbs.

Q. Now, then, as I understand your testimony, after leaving San Francisco the boat went over to Oakland and completed her discharge.

A. This record shows on this page in red ink, "Gone to Oakland at 1:15 P. M." Over on the other page it says, "1780 tons, 130 lbs. were discharged in Oakland." [359—304]

Q. The out-turn weights representing that part of the cargo discharged in Oakland plus the out-turn weight representing that part of the cargo discharged in San Francisco would give the total out-turn weight of the boat, would it not? A. Yes.

Q. And the difference between the total out-turn weight and the invoice weight represents the shortage to which you have testified, and which appears on Table A, Exhibit 125, and likewise the book of the defendant Mills? A. That is true.

Mr. ROCHE.—I would like to read the summary-sheets of this steamer "Thor," likewise, for the purpose of showing the disposition of all the coal weighed out of her. July, 1910, summary of North Wellington coal discharged ex—"Thor," Folsom street wharf.

(Testimony of W. H. Tidwell.)

I am just going to read the totals here, Mr. McCutchen. "1910, July 21, 113 tons, 1920 lbs., laden into the barge "Ruth"; July 22d, 17 tons, 140 lbs., discharged into the offshore bunkers; 339 tons, 170 lbs., laden into the barge "Ruth"; July 23, 357 tons, 1660 lbs. into the offshore bunkers; July 25, 379 tons, 1680 lbs. into the offshore bunkers; July 26, 127 tons, 1040 lbs. discharged into the offshore bunkers." In addition to that the sheet shows the following totals: Total discharged into the barge "Ruth" and offshore bunkers 1334 tons, 2130 lbs.; into the yard bunkers, 2889 tons, 340 lbs. Under the designation "bunkers" here, 1238 tons, 850 lbs., which indicates the yard—Mr. Tidwell, I will just call your attention to this summary here, under the word "bunkers" where it alone appears, that means into the yard, does it not?

A. Yes, I think we can determine that definitely by the books [360—305] here. What is the amount there?

Q. The total is 1238 tons.

A. It is the wharf bunkers, the inshore bunkers.

Q. And the yard bunkers would be 2889 tons, 340 lbs.? A. Yes.

Mr. ROCHE.—Then change it, discharged into the yard itself, 2889 tons, 340 lbs.; into the inshore bunkers or yard bunkers 1238 tons, 850 lbs., making a total discharge of 5462 tons, 1080 lbs.

* * * * *

Q. Now, will you refer to Exhibit "C," please, Mr. Tidwell. I want to call your attention to some of the overages there for the purpose of directing them to

(Testimony of W. H. Tidwell.)

the attention of the jury, and likewise for the purpose of indicating in a general way the percentage of overages as based upon the total quantity of coal checked or discharged into the barge. * * * Table C, which you have in your hand, shows, as you have already testified, that a portion of the coal discharged from the barge upon which drawbacks were claimed, as well as that portion of the coal upon which there were no drawbacks claimed because the coal was not laden into an American vessel foreign bound; that is so, is it not? A. Yes, sir.

Q. Now, directing your attention to page 2, the first entry appearing upon page 2, the barge "Theobold," will you just indicate to the jury the coal that was checked into that barge, the coal checked out, and upon what vessels the coal was laden, and likewise the overage, if any?

A. The date is January 31, 1906, the barge "Theobold" received from the steamer "Tellus" 1114 tons, 480 pounds; the vessel "Torje Viking" 410 tons, 1100 pounds, making a total of 1524 tons, 1580 [361—306] pounds. There was discharged from the barge "Theobold" into the "Sierra" 951 tons, 91 pounds; the steamship "Mongolia" 717 tons, 1515 pounds, making a total of 1668 tons, 1606 pounds discharged, which was 144 tons and 26 pounds more than was laden on the barge.

Q. That percentage is approximately what?

A. Approximately nine per cent.

Q. About nine per cent overage? A. Yes, sir.

Q. Can you state whether upon any part of that

(Testimony of W. H. Tidwell.)

coal thus laden originally into the barge "Theobald" and afterward discharged into the steamship "Sierra" and into the steamship "Mongolia," drawback claims were made?

A. A drawback claim was made for the 951 tons discharged into the "Sierra," on Drawback Entry No. 83, and in the "Mongolia" the drawback entries are numbered 87 and 89.

Q. It is a fact, is it not, Mr. Tidwell, that the United States Government returned to the owners of the two steamships, the "Sierra" and the "Mongolia," customs duties upon all of that coal, including the 144 tons and 26 pounds overage; is that correct?

A. Yes, sir.

* * * * *

Q. Now, I direct your attention to the last item appearing on that page.

A. February 10, the barge "Nanaimo" received from the steamship "Titania 366 tons, 590 pounds, and there was laden on the steamship "China" 480 tons 436 pounds, and on the track, 5 tons, 1620 pounds, making a total discharge from the barge of 485 tons, 2056 pounds, or 119 tons 1466 pounds more than was laden on the barge.

Q. In other words, although there were laden upon the barge originally only 366 tons, 590 pounds, there were checked out of [362—307] that barge, and laden upon the two steamers, 119 tons, 1466 pounds in excess of the 366 tons, 590 pounds; is that correct?

A. Yes, sir.

Q. And that percentage is approximately what?

A. Approximately 11.

(Testimony of W. H. Tidwell.)

Q. What is that? A. Excuse me, that is wrong.

Q. It is nearer to 40, is it not? A. It is about 38.

Q. I would like to have you look at the diary kept by the defendant Mills, for the purpose of ascertaining, if you can tell from that book, what period of time that coal remained on that barge?

A. It appears to have been placed on the barge "Nanaimo," 366 tons, 590 pounds, on Saturday, February 3d, and was finally checked out on the 10th.

Mr. KNIGHT.—What year is that, Mr. Roche?

Mr. ROCHE.—1906.

Q. So that the coal was on the barge for approximately a week, according to these records?

A. Yes, sir.

Q. Now, going back for a moment to your Table C, I will ask you to look at that table and state what portion or quantity of the coal thus discharged from that barge was laden into an American bottom foreign bound, upon which a drawback claim was made?

A. 480 tons, 436 pounds were laden into the steamship "China," and the drawback claimed on drawback entries No. 93 and 96.

* * * * *

Q. The situation, so far as this item is concerned, Mr. Tidwell, is that there were 366 tons, 590 pounds laden into the barge, and that amount plus 119 tons, 1466 pounds more checked out? A. Yes, sir.

Q. And that percentage is approximately what?
[363—308]

A. 38 per cent approximately.

* * * * *

Q. Just read the next entry, Mr. Tidwell.

(Testimony of W. H. Tidwell.)

A. The barge "Ludlow," under date of March 5, received from the vessel "Otto" 633 tons, 10 pounds; from the bunkers, 158 tons, 1560 pounds; making a total received of 791 tons, 1570 pounds; and discharged into the steamship "Ventura" 850 tons, 698 pounds, or 58 tons, 1368 pounds more than was laden on the barge.

Q. Was there any claim made by any person or corporation for the return to him or to it of the duties paid upon that coal?

A. Yes, sir. Drawback Entries Nos. 102 and 103 were filed for the total amount of coal laden on the steamship "Ventura," which included the 58 tons overage.

Q. Those drawback claims were based upon the entire quantity of coal checked out? A. Yes, sir.

Q. Including the overage of 58 tons, 1368 pounds; is that correct? A. Yes, sir.

Q. Now, I direct your attention to the item appearing upon the top of the succeeding page, page 4, and ask you to explain that item to the jury?

A. Under date of March 17, 1906, the barge "Melrose" received from the "Tellus" 969 tons, 670 pounds; the offshore bunkers, 47 tons 1070 pounds; the "Otto" 641 tons 1230 pounds, or a total of 1658 tons, 730 pounds; and discharged into the steamship "Doric" 549 tons, 87 pounds; into the steamship "Manchuria" 131 tons, 1466 pounds; into the steamship "Korea" 1160 tons, 2091 pounds, making a total discharge of 1841 tons, 1404 pounds, or 183 tons 647 pounds more than was laden on the barge.

Q. In other words, there were 183 tons, 647 pounds

(Testimony of W. H. Tidwell.)

taken off the barge more than was checked into it; is that correct? [364—309] A. Yes, sir.

Q. And that excess or overage represents what percentage of the quantity of coal laden into the barge?

A. About 11 per cent.

Q. Were there drawback claims interposed for any part of that cargo?

A. A drawback was claimed for the amount laden on the steamship "Manchuria," on drawback entry 100; and on the "Korea" on drawback entries 106 and 108.

Q. And paid by the Government?

A. And paid by the Government. The steamship "Doric" was under the English flag, and drawback was not paid.

Q. Will you turn to page 7 of Table C? Directing your attention to the first entry upon that page, the barge "Energy," I wish you would state what it shows?

A. Under date of May 12, 1906, the barge "Energy" appears to have received from the vessel "Torje Viking," 344 tons, 200 pounds, and discharged into the "City of Para," 310 tons, 125 pounds; and into the steamship "Doric" 68 tons, 800 pounds, or a total of 378 tons, 925 pounds, or 34 tons, 725 pounds more than was laden on the barge.

Q. That is 34 tons and 725 pounds plus the 344 tons and 200 pounds deposited; is that correct?

A. Yes, sir; making 378 tons, 925 pounds.

Q. What would be the percentage of overage in that instance? A. About ten per cent.

(Testimony of W. H. Tidwell.)

Q. And was there a drawback claim interposed for any part of that cargo, including the excess cargo?

A. A drawback was claimed. * * * A drawback was claimed on the amount laden on the "City of Para," in drawback entry No. 125. [365—310]

Q. And paid by the Government?

A. The amount was paid by the Government.

Q. On the same page, directing your attention, again, to the barge "Ludlow," I wish you would read what it shows?

A. On May 22d, the barge "Ludlow" received from the "Torje Viking" 683 tons, 150 pounds, and from the steamer "Tellus" 645 tons 1910 pounds, or a total of 1328 tons, 2060 pounds; and discharged into the steamer "Doric" 266 tons, 1535 pounds; into the "City of Sydney," 253 tons 259 pounds; the "Burnside," an Army transport, 350 tons, 1980 pounds; and into the "Logan," also a transport, 586 tons 64 pounds, making a total discharge of 1456 tons, 1598 pounds, or 127 tons, 1778 pounds more than was laden on the barge.

Q. That is, the amount laden on the barge being 1328 tons, 2060 pounds, there was an overage of 127 tons, 1778 pounds? A. Yes, sir.

Q. Or a percentage of what, approximately?

A. About 9 per cent.

Q. I direct your attention to an item appearing upon page 11 of this table, under date of September 14th. I wish you would read that.

A. The barge "Ruth"—

Q. (Intg.) Let me put the question to you in this way, Mr. Tidwell: That item shows, does it not, that

(Testimony of W. H. Tidwell.)

upon the barge "Ruth" there was laden from the off-shore bunkers, in four loads, 1256 tons, 140 pounds; is that correct?

A. No, it is 1288 tons, 140 pounds.

Q. Yes, I guess that is the number. It also shows that 681 tons 1260 pounds were laden upon the steamer "Sierra" and 738 tons, 681 pounds laden upon the steamship "Siberia," making a total discharge of 1419 tons, 1941 pounds, the overage being [366—311] 131 tons, 1801 pounds; is that correct?

A. Yes, sir.

Q. What percentage does that represent?

A. About 11 per cent.

Q. About 11 per cent of the total amount of coal laden upon that barge? A. Yes, sir.

Q. Can you state whether, for the return of the import duties, any claim was made, and if so, for what part of that coal, if for less than the whole of it?

A. Drawback Entry No. 20 was filed for 681 tons, 1260 pounds laden on the "Sierra"; and drawback entry No. 25 for 738 tons, 681 pounds for the coal laden on the "Siberia," both of which were paid.

Q. In other words, drawback claims were made covering the whole of the weight of the coal discharged from that barge? A. Yes, sir.

Q. Is that correct, including the excess?

A. That is correct.

* * * * *

Q. It is a fact, nevertheless, that claims were presented and paid by the Government for all of that coal? A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Now, I want to direct your attention to another item appearing on the same page, under date of September 25, referring to the barge "Comanche."

A. The barge "Comanche" received from the yard 365 tons, 1810 pounds; offshore bunkers, 66 tons 640 pounds, making a total of 432 tons, 210 pounds; and discharged into the steamship "Aztec" 100 tons, 865 pounds; into the "City of Sydney," 385 tons, 1360 pounds, making a total discharge of 485 tons, 2225 pounds, or 53 tons, 2015 pounds more than was laden on the barge. [367—312]

Q. That would be a percentage of what?

A. About 11 per cent.

Q. Now, I want to call your attention to a part of that item; it is a fact, is it not, that according to the records of the Western Fuel Company, and, in fact, according to the books kept by Mr. Mills, 365 tons, 1810 pounds came from the yard of the Western Fuel Company? A. Yes, sir.

* * * * *

[Testimony of D. C. Norcross, for the Government (Recalled).]

D. C. NORCROSS, a witness recalled for the United States, testified as follows:

Direct Examination by Mr. ROCHE.

According to my understanding it is not a fact that all of the coal taken from the yard of the Western Fuel Company would be weighed before it would leave the premises. At times coal is taken from the yards to the barges without being weighed. I was never present on an occasion when that occurred.

[**Testimony of W. H. Tidwell, for the Government
(Recalled).**]

W. H. TIDWELL, recalled for the United States, resumed his testimony as follows:

Direct Examination by Mr. ROCHE.

Mr. ROCHE.—Q. As I understand it, Mr. Tidwell, 365 tons, 1810 pounds, constituting the quantity of coal that was put into these vessels according to the records kept by the defendant Mills, did come from the yard. A. That is true.

Q. Now, I direct your attention to the first item appearing upon the top of page 12 of Table C, the barge “Theobold”; will you [368—313] please read that?

A. Under date of October 4, 1906, the barge “Theobold” appears to have received from the steamer “Torje Viking” 1052 tons, 1740 pounds, and to have discharged into the steamer “Sonoma” 1134 tons, 1297 pounds, or 81 tons, 1797 pounds more than had been laden on the barge.

Q. Was there any drawback claim made against the Government for the return of the import duty?

A. A drawback claim was made on Drawback Entry No. 30 for the entire amount which was laden on the vessel.

Q. Including the overage of 81 tons; is that correct? A. Yes, sir.

Mr. McCUTCHEN.—If it were for the entire amount, Mr. Roche, and the entire amount included the overage, then it must have included the overage; why the necessity of repeating that all the time?

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Well, I am glad that you will admit something, Mr. McCutchen, and I suppose you will also admit that it was paid by the Government?

Mr. McCUTCHEN.—I will, if you state it to be the fact, subject to correction.

Mr. ROCHE.—I understand it to be the fact.

Q. Are the sheets which you now hold in your hand a reproduction of the figures of the defendant, Mills, in so far as they relate to the discharge of one steamship and the distribution of the coal into the offshore bunkers and into the barges? A. Yes, sir.

Q. I would like to have you take those sheets, Mr. Tidwell, and explain those entries to the jury. Will you please turn to that part of the diary in which those entries appear?

* * * * *

[369—314]

A. Yes, I have it; it is January.

Q. To what does the entry relate?

A. It is of date January 27, 1911, and refers to the discharge of the steamship "Thor."

Q. Now, just go right ahead. Now, as I understand it, those sheets are substantially and in fact a reproduction of the entries of the defendant Mills, with relation to the discharge of that cargo, and the distribution of the coal contained in that cargo; that is correct, is it not? A. Yes, sir.

Mr. McCUTCHEN.—Do I understand that they are simply a copy of the record?

Mr. ROCHE.—That is all; simply a copy of the record, itself. I want him to explain it to the jury,

(Testimony of W. H. Tidwell.)

so that the jurors can see the entries at the time the explanation is made, as to just exactly what the entries of the defendant Mills show.

A. As this appears in the books, the date is January 27, 1911; the steamship "Thor" discharged into the wharf bunkers 245 tons, 1070 pounds; into the yard bunkers 63 tons, 1280 pounds; into the barge "Ruth" 106 tons, 370 pounds, making a total discharge for this particular period of 415 tons, 480 pounds. On Saturday, the 28th and 29th, she discharged the difference between this and this amount, making a total on that particular day of 632 tons, 1220 pounds to the wharf bunkers.

Q. In other words, that is one of the totals to which you referred when you were being examined concerning the entries in Mr. Mill's books? A. Yes, sir.

Q. Instead of showing the separate amounts discharged each day, you would add the quantity of coal on the previous date or dates, and simply carry forward the total?

A. Yes, sir. The amount discharged on these dates was added to this amount, making the total on those three days. [370—315]

Q. In other words, to get the quantity discharged on Saturday the 21st, you would have to deduct the quantity shown by the entries to have been previously discharged from the figures appearing on that date?

A. Yes, sir; that amount would be shown by the discharge sheets kept by the Western Fuel Company; the daily discharge. 688 tons, 240 pounds discharged into the yard; 289 tons, 2010 pounds into the off bunkers; 195 tons, 1410 pounds into the barge "Ruth,"

(Testimony of W. H. Tidwell.)

making a total discharge up to this date, and including this date, of 1806 tons, 400 pounds. The barge "Ruth," it would be shown, received on the 28th and 29th.

Mr. McCUTCHEN.—Q. Just a moment: What do you mean by saying, "It will be shown"?

A. By this record here.

Mr. McCUTCHEN.—I understood this witness was simply taking the record as it was, Mr. Roche.

Mr. ROCHE.—He is explaining the record, Mr. McCutchen.

Q. Let me ask you this: I notice that no entry appears on this side of the sheet representing the first date of discharge; will you explain to the jury what that indicates, if anything?

A. We have only treated with the vessel "Thor"; there may be an entry on the books on this particular date, but it would not relate to the discharge of any coal with reference to the steamer "Thor," and consequently it was not used; the barge "Ruth" received from the offshore bunkers on Saturday, the 28th and 29th, which I suppose, I don't know what 29th means, but that is the way the record shows it, 558 tons, 1970 pounds; offshore bunkers again, 600 tons, 60 pounds; again, from the offshore bunkers, 56 tons, 240 pounds; and from the steamship "Thor," 195 tons, 1410 pounds, as shown by the record, here. She discharged into the steamship "Peru" 275 tons, 1062 pounds; the steamer "San Jose" [371—316] 317 tons, 222 pounds; the "City of Para," 184 tons, 840 pounds, or a total discharge of 776 tons, 2124 pounds,

(Testimony of W. H. Tidwell.)

leaving a balance in the barge "Ruth" of 39 tons, 1556 pounds.

Q. That is, at the close of that date; is that correct?

A. At the close of that date; yes, sir.

Q. Now, go ahead and explain the second sheet. That represents the continuation of the daily entries from what are shown upon the first sheet?

A. Yes, sir, January 30th; on January 30th, and including the other dates, there was discharged into the wharf bunkers 737 tons, 1860 pounds; the yard bunkers, 839 tons, 1760 pounds; offshore bunkers, 369 tons, 920 pounds; the barge "Ruth," 195 tons, 1410 pounds; making a total discharge up to and including this date of 2142 tons, 1470 pounds. This was taken up from the other sheet and I believe was brought forward, if my memory serves me correctly; yes, it was brought forward.

Q. That is, that represents the total coal laden upon the barge, without having made any deduction from the quantities previously discharged?

A. Yes, sir.

Q. And on this particular date, she again discharged, did she?

A. Yes, sir; she discharged into the "City of Para" the difference between 184 tons, 840 pounds and 290 tons, 1432 pounds, or a total discharge from the barge during that period of 883 tons, 476 pounds, making an overage of 66 tons, 1276 pounds more than was laden on the barge.

* * * * *

Q. Just proceed, now, Mr. Tidwell.

(Testimony of W. H. Tidwell.)

A. I think we have finished with this one, showing this barge to be 66 tons, 1276 pounds over.

Q. So that there will not be any misunderstanding between us, [372—317] and so that counsel on the other side of this case will understand our attitude, it is true that the 66 tons, 1276 pounds, overage, represents the overage existing upon that barge between the date of the previous cleanup and the date of this cleanup, to wit, January 30, 1911. A. Yes, sir.

Q. And, of course, there is some coal taken into consideration in figuring that overage which was not discharged from the steamship "Thor"?

A. Only a small part of it, as I remember it, was discharged from the "Thor," only 195 tons, 1410 pounds was discharged from the "Thor."

Q. Now, you may proceed.

A. On Tuesday, January 31, there was discharged from the "Thor," totals, 958 tons, 970 pounds to the wharf bunkers; 1556 tons, 560 pounds to the yard bunkers; 369 tons, 920 pounds to the offshore bunkers; 195 tons, 1410 pounds to the barge "Ruth"; 290 tons, 670 pounds to the barge "Nanaimo."

Q. That made a total discharge, according to these records, as indicated on the record itself, of what?

A. 3370 tons, 50 lbs.

Q. Now, will you take the next sheet and proceed with your explanation?

A. On Wednesday, February 1st, the vessel discharged, a total discharge of 1279 tons, 2170 lbs. to the wharf bunkers, 2137 tons, 290 lbs. to the yard bunkers; 520 tons, 1510 lbs. to the offshore bunkers;

(Testimony of W. H. Tidwell.)

195 tons, 1410 lbs. to the barge "Ruth"; 412 tons, 2090 lbs. to the barge "Nanaimo"; 74 tons, 1300 lbs. to the barge "Ruth," second load—

The COURT.—Mr. Tidwell, when you speak of the discharge on a certain day don't you think it would be more accurate if you would say it this way: At the close of that day there had [373—318] been discharged so and so much?

Mr. ROCHE.—Yes, your Honor, I think that would be better; I was just going to direct the witness' attention to that.

Q. Just before you conclude that date, and so that the jurors will understand exactly what these figures mean, these figures, to which you have just been directing the attention of the jurors, are totals indicating the total cargo discharged up to the evening of that date; is that correct? A. Yes, sir.

Q. Then at quitting time on the afternoon of Wednesday, February 1st, out of the cargo of coal imported into this port on the steamship "Thor," there had been discharged into the wharf bunkers, 1279 tons, 2170 lbs.; into the yard bunkers, 2137 tons, 290 lbs.; into the offshore bunkers, 520 tons, 1510 lbs.; into the barge "Ruth" 195 tons, 1410 lbs.; into the barge "Nanaimo" 412 tons, 2090 lbs.; and in addition to the 195 tons, 1410 lbs. there had likewise been discharged into the barge "Ruth" 74 tons, 1300 lbs.; that is correct, is it not? A. Yes, sir.

Q. From the system pursued by the defendant Mills, in keeping his books, and I am asking you this because it occurs to me that this is an explanation of

(Testimony of W. H. Tidwell.)

those two figures, are you able to state whether the 74 tons, 1300 lbs., indicated in these figures as having been laden on the barge "Ruth" separate from the 195 tons, 1410 lbs. because of the fact that the 74 tons, 1300 lbs. had been placed in the barge after the cleanup?

* * * * *

The WITNESS.—It shows here, on January 30th, that all had been checked out, and that there was no coal left in here.

Q. In other words, the cleanup of the barge occurred on January [374—319] 30th, 1911; is that correct? A. Yes, sir.

Q. When the overage of 66 tons, 1276 lbs. was ascertained? A. Yes, sir.

Q. This record shows, does it not, that the 195 tons, 1410 lbs., which had been laden upon the barge "Ruth," discharged from the steamship "Thor," was included in these figures as the result of which the overage was determined? A. That is true.

Q. And, so, of course, that quantity of coal had to be upon the barge at the time of the cleanup?

A. Yes, sir; after the cleanup from some vessel there was 74 tons, 1300 lbs. laden on the barge "Ruth," which appears on the record as a second load. On February 2d there had been discharged into the wharf bunkers 1341 tons, 1920 lbs.; the yard 2199 tons, 1800 lbs.; offshore bunkers, 520 tons, 1510 lbs.; the barge "Ruth," 195 tons, 1410 lbs.; that was the first load, the first "L," as it is shown here; 349 tons into the barge "Ruth," the second "L," as it is shown here.

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—Q. Is that taken from the book, the first “L” and the second “L”?

A. Yes, sir.

Mr. ROCHE.—Q. That is supposed to represent the book itself, is it not?

A. Yes, sir. 412 tons, 2190 lbs. into the barge “Nanaimo,” and 693 tons, 1170 lbs. into the barge “Theobold,” making a total amount as having been discharged up to and including this date, 5713 tons, 940 lbs. On Friday, the 3d of February, there had been discharged into the wharf bunkers 1341 tons, 1920 lbs.; yard bunkers, 2601 tons, 110 lbs.; offshore bunkers, 641 tons, 30 lbs.; the barge “Ruth,” first load, 195 tons, 1410 lbs.; the barge “Ruth,” second load, 349 tons; the barge “Nanaimo,” 412 tons, 2090 lbs.; the barge “Theobold,” 946 tons, 1140 lbs.; the barge “Comanche,” 702 tons, 1160 lbs.; [375—320] making a total discharge up to and including this date of 7190 tons, 1140 lbs., the vessel being short 52 tons, 1100 lbs. of its invoice weight.

Q. The word “short” and the figures “52 tons, 1100 lbs.”; I am supplying the tons and lbs. because it will be conceded that that is correct, appear in the books kept by the defendant Mills; is that correct, Mr. Tidwell? A. Yes, sir.

Q. In other words, that is an exact reproduction of the figures and entries? A. Yes, sir.

Q. And that represents, does it not, the complete discharge of that cargo? A. Yes, sir.

Q. The entries continue, do they not, showing the disposition of the cargo, the final disposition?

(Testimony of W. H. Tidwell.)

A. The disposition of the cargo, yes, sir.

Q. Now, of course, if you will pardon me just a moment, there are entries upon the other side of the sheet in the books kept by the defendant Mills, but which relate to the cargo of a different ship; is that true?

A. Yes, sir. On Saturday, the 4th of February, the barge "Nanaimo" had received 14 tons, 460 lbs. from the offshore bunkers; 369 tons, 920 lbs. from the offshore bunkers; from the steamer "Thor," 412 tons, 2090 lbs., making a total received of 796 tons, 1230 lbs. On this date she discharged into the steamship "Siberia" 237 tons, 360 lbs., representing a balance of 559 tons, 870 lbs. On Monday, February 6th, 1911, the record still shows this amount which she had received on the previous dates from the offshore bunkers, 14 tons, 460 lbs.; offshore bunkers, 369 tons, 920 lbs.; the steamship "Thor" 412 tons, 2090 lbs., showing the total on board of 796 tons, 1230 lbs.; and that there had been discharged into the "Siberia" up to and including this date 505 [376—321] tons, 1340 lbs., leaving a balance in the barge of 290 tons, 1230 lbs.

Q. Now, let me just ask you this question; Under date of Monday, February 6, 1911, appears an entry, "Steamer Siberia, 505 tons, 1340 lbs." That represents, does it not, not only the amount of coal taken from the barge and discharged into the steamer "Siberia" on February 6th, 1911, but in addition thereto the 237 tons, 360 lbs. discharged into the steamship "Siberia" on the preceding Saturday?

(Testimony of W. H. Tidwell.)

A. That is true.

Q. In other words, these totals being carried forward the same as you have already testified; is that correct? A. Yes, sir; day by day.

Q. The disposition of this cargo which was discharged from the steamer "Thor" is now being proceeded with according to these books, is it?

A. It still shows the amount which had been received on the previous dates into the barge "Nanaimo," aggregating 796 tons, 1230 lbs., and up to and including this date there had been discharged into the steamship "Siberia" 663 tons, 850 lbs., leaving a balance in the barge of 133 tons, 380 lbs. On Wednesday, the 8th, the same amounts appear as having been received, making a total of 796 tons, 1230 lbs. The discharge into the "Siberia" appears to have been continued and on this date there had been discharged 775 tons, 1656 lbs., leaving a balance of 20 tons, 1804 lbs., on the "Nanaimo."

Q. In other words, she took on no more coal on the 8th but she discharged some portion of the cargo then remaining upon her into the steamship "Siberia"?

A. Yes, sir. Thursday, February 9, 1911, the barge "Comanche" appears to have received 112 tons, 74 lbs., from the offshore bunkers; from the steamship "Thor" 702 tons, 1160 lbs., or a total of [377—322] 814 tons, 1234 lbs.; and on the same date discharged into the "Siberia" 559 tons, 1360 lbs., leaving a balance on board the barge of 254 tons, 2114 lbs. On Thursday, February 9th, 1911—this is a different vessel.

(Testimony of W. H. Tidwell.)

Q. Oh, you have produced the entire entries, have you, although some of them relate to a different vessel. On Thursday, February 9th, 1911, the barge "Theobald" appears to have received 107 tons, 340 lbs. from the offshore bunkers; 946 tons, 1140 lbs. from the steamship "Thor," making a total received of 1053 tons, 1480 lbs.; on this date she discharged into the "Siberia" 474 tons, 183 lbs., leaving a balance on the barge of 579 tons, 1297 lbs. Friday, the 10th, the barge "Comanche" appears to have received 112 tons, 74 lbs. from the offshore bunkers; from the steamer "Thor" 702 tons, 1160 lbs., making a total received of 814 tons, 1234 lbs.

Q. Let me ask you right here, Mr. Tidwell: the 814 tons, 1234 lbs. represents a total quantity of coal laden upon that barge after the previous cleanup; is that correct? A. Yes, sir.

Q. All right, Mr. Tidwell, proceed.

A. She discharged into the steamer "Siberia" 845 tons, 2108 lbs., or 31 tons, 874 lbs. more than had been laden on the barge.

Q. The word "over" and the figures "31 tons, 874 lbs." are reproduced from the book? A. Yes, sir.

Q. And the "E" in red ink is also from the book?

A. Yes, sir, and also the number "1765" which refers to the number of a slip or a tag on which this discharge of coal was reported to the office.

Q. That is the tag to which you referred, or tags similar in [378—323] kind to the tags I hold in my hand, and which have heretofore been marked "U. S. Exhibit 127"? A. Yes.

(Testimony of W. H. Tidwell.)

Q. And "over 31 tons, 874 lbs.," represents the excess coal in weight taken off the barge more than was checked into her?

A. Yes, sir. Friday, the 10th, the barge "Theobold" appears to have received from the offshore bunkers 107 tons and 340 lbs.; from the steamship "Thor" 946 tons, 1140 lbs., or a total of 1053 tons, 1480 lbs.; and discharged into the steamship "Siberia" 615 tons, 618 lbs., leaving a balance in the barge of 438 tons, 862 lbs.

Mr. ROCHE.—Q. You are still continuing with the discharge of this steamship "Thor"?

A. This all refers to coal which was imported on the "Thor."

Q. Go ahead.

A. The barge "Ruth" appears to have received from the offshore bunkers 53 tons, 340 lbs. and the "Thor" 349 tons; offshore bunkers 52 tons, 340 lbs. From the "Puritan" 444 tons, 30 lbs., a total received by the barge of 898 tons, 710 lbs. She discharged into the steamer "Maitai," I believe it is, 300 tons; the "City of Sydney," 112 tons, 1854 lbs. a total discharge for this day of 412 tons, 1854 lbs., leaving a balance in the barge of 485 tons, 1096 lbs. Saturday, the 11th, the "Theobold" appears as receiving from the offshore bunkers—this amount was stated, which was received, on the previous sheet.

* * * * *

Q. In other words, those figures simply are a reproduction of the figures shown upon the previous page? A. On the previous sheet.

(Testimony of W. H. Tidwell.)

Q. And they are carried forward from time to time in this diary?

A. Yes. In this sheet the "Puritan" appears to have received [379—324] a total of 1053 tons, from the offshore bunkers—1053 tons 1480 lbs., from the offshore bunkers, and the steamer "Thor," and discharged into the steamer "Siberia" 902 tons, 38 lbs., leaving a balance of 151 tons, 1442 lbs. in the barge. Saturday the 11th. The "Ruth" again. It has previously been shown that the "Ruth" had received these amounts which are shown here, making a total of 898 tons, 710 lbs., and that she has discharged 300 tons into the "Maitai," 265 tons, 522 lbs. into the "City of Sydney," making a total discharge of 565 tons, 522 lbs., leaving a balance of 333 tons in the barge. On Saturday the 11th, the same day, the barge "Nanaimo" appears to have received—this I think has also been gone into.

Q. These have all been repeated?

A. Yes; it appears to have received up to and including this date 1414 tons, 430 lbs. and discharged into the steamer "Siberia" 775 tons, 1656 lbs., and the steamer "Pennsylvania" 75 tons, 100 lbs., making a total discharge of 850 tons, 1756 lbs., leaving a balance of 563 tons, 914 lbs. in the barge. The barge "Theobold," which has heretofore been shown to have received up to and including this date, 1053 tons, 1480 lbs., discharged into the steamer "Siberia" 1067 tons, 693 lbs., or 13 tons, 1453 lbs. more than was laden on the barge. Then appears "E," which I am unable to explain.

(Testimony of W. H. Tidwell.)

Q. The overage of 13 tons, 1453 lbs., represents of course the excess of coal weighed out of her beyond the amount of coal received in since the last cleanup?

A. Yes. This number also shows the date which it was reported on, Monday, February 14, 1911, barge "Nanaimo."

Q. Those figures have already been shown?

A. Yes. She had received a total of 1414 tons, 430 lbs. altogether; she discharged into the "Siberia" 775 tons, 1656 lbs.; into the "Pennsylvania" 424 tons, 1744 lbs., making a total discharge of 1200 tons, 1160 lbs., up to and including this date, leaving [380—325] a balance in the barge of 213 tons, 1510 lbs.

Q. What is the "Puritan"—the "Puritan" is a steamer, is she not? A. I don't know what she is.

Mr. McCUTCHEN.—I understood you were tracing the coal from the steamer "Thor."

The WITNESS.—We are.

Q. Haven't you got something from the "Puritan" there in the last sheet?

A. Yes, but the "Thor" appears here.

Mr. ROCHE.—You see there is still some part of the coal discharged from the "Thor."

A. That is the offshore bunker.

Mr. McCUTCHEN.—I understood you to say this operation was to trace the coal that had been landed from the "Thor"?

Mr. ROCHE.—That is correct; we are following this along until you finally complete the cargo of that steamer "Thor," but towards the latter end, of course, there is coal placed upon these barges from

(Testimony of W. H. Tidwell.)

some other source, but they are all foreign imported coal.

A. (Continuing.) The barge "Ruth" again on Wednesday, the 15th, as has been previously stated, she had received a total of 898 tons, 710 lbs. altogether; she had discharged into the "Maitai" 300 tons, into the "City of Sydney" 265 tons, 522 lbs. The "China" appears but not the tonnage. On February 16, 1911, the barge "Ruth" again appears, showing that she had received a total of 898 tons, 710 lbs., and discharged into the "Maitai" 300 tons, the "City of Sidney" 265 tons, 522 lbs., and the "China" 286 tons, 1202 lbs., or a total of 851 tons, 1724 lbs., leaving a balance of 46 tons, 1226 lbs. in the barge.

Q. Let me ask you this question by way of explanation in view [381—326] of the suggestion made by Mr. McCutchen a short while ago. As you have already testified, and as these records show, of course a part of the cargo discharged from the steamer "Thor" went into the yards, did it not? A. Yes.

Q. A part of the cargo discharged from the steamer "Thor" went into what is known as the in-shore bunkers? A. Yes.

Q. Now, can you state whether all of the coal which came out of the steamer "Thor," which did not go into the yard and which did not go into the offshore bunkers, is accounted for in these tabulations?

A. Yes, the entire discharge of the "Thor" is accounted for in this tabulation.

Q. Proceed.

A. Friday, the 17th, the barge "Ruth" again ap-

(Testimony of W. H. Tidwell.)

pears, showing that she has received a total of 898 tons, 710 lbs.; that there had been discharged from the barge "Ruth" up to and including this date 967 tons, 1906 lbs., showing an overage on the barge, discharged from the barge, of 69 tons, 1196 lbs., representing more actually than the records show was laden on the barge.

Q. Between the date of the preceding cleanup and this date?

A. Yes. Monday, March 6th, 1911, barge "Nanaimo"; she had received more coal, she appears to have received—I will change that entirely. She appears to have received from the offshore bunkers, 14 tons, 1460 lbs.; offshore bunkers 369 tons, 920 lbs.; steamer "Thor" 412 tons, 2090 lbs.; offshore bunkers, 56 tons, 1900 lbs.; "Puritan," 560 tons, 1780 lbs.; offshore bunkers, 518 tons, 30 lbs., or a total amount laden on the barge of 1932 tons, 460 lbs., which was discharged into the "Siberia," the "Pennsylvania," and the "Asia,"—a total of which was discharged into the "Siberia," "Pennsylvania" and [382—327] "Asia" of 1519 tons, 972 lbs., leaving a balance on the barge of 412 tons, 1728 lbs.

Q. That is the last sheet showing the discharge of the "Thor"?

A. Barge "Nanaimo," on Tuesday, the 7th, showed a total received of 1932 tons, 460 lbs.; a total discharge of 1704 tons, 284 lbs., with a balance of 228 tons, 176 lbs. On the 8th, Wednesday, there is shown a total amount received of 1932 tons 460 lbs.

* * * * *

A. No further coal seems to have been laden on

(Testimony of W. H. Tidwell.)

her. It still shows a total received of 1932 tons, 460 lbs., with a total discharge of 1989 tons, 356 lbs., or over 56 tons, 2136 lbs.

Q. In other words, 56 tons, 2136 lbs. was taken off of that barge in excess of the amount checked in or laden upon her; is that correct? A. Yes.

Q. Between that date and the date of the previous clearance? A. Yes.

The diary or dock books kept by the defendant Mills from January 1, 1904, to the end of December, 1912, disclose, to the best of my knowledge, the receipt and disposition of every cargo of foreign coal in the same manner as the entries that have already been called to the attention of the jury and to which I have testified. The bookkeeping is the same as the samples which I have gone over.

**[Testimony of William Chisholm, for the
Government.]**

WILLIAM CHISHOLM, a witness called for the United States and sworn, testified as follows:
[383—328]

Direct Examination by Mr. ROCHE.

I live in San Francisco. I am now and have been for six years and eleven months last past marine superintendent of the Pacific Mail Steamship Company. My office is at pier 42. Before I became marine superintendent I was chief engineer of the steamship "Mongolia" of the Pacific Mail Steamship Company, plying between San Francisco and Oriental ports. I am and have been for some time past

(Testimony of William Chisholm.)

familiar with various employees connected with the company, and particularly with those employed on the boats plying between San Francisco and other ports. In 1906 there was a Captain Anderson, who was captain of the old mail dock. He is now dead. I believe he had been in the employ of the company for fourteen years. He died four or five years ago. There was a man known as "Chief Allen," who used to be chief engineer on the "Asia" (which was formerly called the "Doric"). This was one of the boats of the Pacific Mail Steamship Company. I know of a McCarthy in the employ of the Pacific Mail Steamship Company, but I do not know his initials. I have known him for the last ten years, and I believe he has been connected with the company for thirty years. In the year 1906 there was a man named Captain Wilson who was chief or boss stevedore, and who remained in the employ of the company until about two years ago. At that time he was employed jointly by the Pacific Mail and the O. & O. Steamship Company. I think he had supervision of the coal on the ships of the Occidental & Oriental Steamship Company. His initials were "T. D. E." I have a slight acquaintance with a man named B. A. Hartnett or Harnett, who was connected with the Toyo Kisen Kaisha Company. I heard he is at present employed by that company in the Orient. When he was employed by the Japanese Company in San Francisco, his title around the water front was assistant to Mr. Avery, who was assistant to the [384—329] manager of that company. I have an acquaintance with a man named J. Crichton, who, I think, is port stevedore for

(Testimony of William Chisholm.)

the Japanese Steamship Company, and has been for a number of years. I do not know whether he has anything to do with the supervising of the loading of coal upon the boats of that company.

The Pacific Mail Steamship Company for a number of years has been purchasing its coal from the Western Fuel Company.

There once was a Mr. Hauxhurst connected with the Pacific Mail Steamship Company as marine superintendent. The McCarthy of whom I have spoken, is a clerk in the treasurer's office.

(Subject to correction, admitted by counsel for the defendants that the McCarthy, whose name appears in the donation account of the Western Fuel Company, is the McCarthy about whom the witness has just testified.)

My duties as marine superintendent for the Pacific Mail Steamship Company comprise the physical upkeep of their steamers, and I have charge of their docks in general. I have supervision of the coaling of the boats. I certify to the weights of the coal, upon which payments are made by the Pacific Mail Steamship Company to the Western Fuel Company.

I have since I have been marine superintendent received donations from the Western Fuel Company. To the best of my memory the first donation was about the first Christmas that I was marine superintendent. That was in 1908. I received a Christmas present. It was about \$50, and I was receiving that sum each year thereafter. It was in cash. I have also during the entire time that I have been active as marine superintendent been receiving donations of

(Testimony of William Chisholm.)

coal from that company. [385—330] The first donation of this kind, I think, was in 1908. I have been receiving my coal from the Western Fuel Company ever since. It has been delivered at my home in, I think, ton or two ton lots. I would receive two or three such lots each year, I suppose, but I did not keep accurate track or record of it. At any rate, whatever coal I use at my home has been received from the Western Fuel Company, and has been received by me practically ever since I have been marine superintendent. I do not recall ever receiving a bill for such coal. I do not remember ever paying any compensation to the Western Fuel Company for any coal delivered to me. I have no memory of any occasion where the Western Fuel Company turned over \$125 or \$150 to me, nor do I recall distributing any such sum to any of the other employees of the Pacific Mail Steamship Company.

The name of the principal checker or weigher of the Pacific Mail Steamship Company is William Park. He has been chief weigher for, I think, about thirty-one years. His duties consist, among other things, of immediately supervising the discharge and weighing of coal laden into the boats of the Pacific Mail Steamship Company for fuel purposes, and making up the tally sheets and accounts upon which the bills of the Western Fuel Company are finally paid.

Cross-examination by Mr. McCUTCHEN.

Those tally sheets are prepared from weights which are secured from the custom-house or Government

(Testimony of William Chisholm.)

weigher. I have been present from time to time when coal was being delivered by the Western Fuel Company to the Pacific Mail Steamship Company's liners. Mr. Park usually represents the steamship [386—331] company on such occasions, if we are working one barge only; but if we are working more, we have had outside weighers. Mr. Park's duty on such occasions is to check up the tubs with the custom-house weigher. He remains on the barge during the entire operation. He reports to the steamship company the amount of coal that goes each day from the barge into the liner. He gets his weights from the scales and the custom-house officer. The custom-house officer is in charge of the scales and actually manipulates them. Mr. Park has nothing to do with that. The weights which he takes are determined by the custom-house officer. On the barges I know from personal observation that one tub in every 15 is weighed. The custom-house officer designates which tub shall be weighed. While the tubs are being loaded or filled, the officer remains there on the barge, or on the dock close by, where he can witness the operation. When you are first starting on two of the barges you shovel for about an hour and a half or two hours until you get the coal away from the scales and then you take an average. You would then average up a dozen or so buckets right after you get the coal cleaned. When a bill is rendered by the Western Fuel Company to the Pacific Mail Steamship Company for coal supplied by the former to the latter, that bill is checked up with the report to us of Mr. Park. It is part of my duty to see and to

(Testimony of William Chisholm.)

know that the weights for which the Pacific Mail Steamship Company pays the Western Fuel Company are correct. All of the checking up of the weights of the deliveries of coal to the Pacific Mail Steamship Company's liners has been done by Mr. Park until the last year and a half, and during said last year and a half, I should judge, he has done about 90 or 95 per cent of it. Mr. Park takes his station on the barge when the coaling operations are in progress. I have been on the barges, as I have heretofore said, frequently when said operations were going on. Mr. Park was so stationed on those occasions as to be able to see [387—332] the entire operation.

I met once a Captain Lewis, who was in the employ of Hind, Rolph & Company. He was in their employ about two years ago, and was then, I believe, their port captain.

Redirect Examination by Mr. ROCHE.

I have several times stood by and seen coal weighed in the barges,—I should judge half a dozen times in the past several years. I never endeavored to find out what was the weight of coal that was being laden upon a barge, before said coal was discharged from the barge into our liners. Indirectly, I have been notified, as marine superintendent, that the coal was being overweighed. Such indirect notifications came to me while I was receiving donations of coal and money. I think I had such indirect information in 1912. In 1909 I received notice about the first shortage of coal on one of our ships. I never made any

(Testimony of William Chisholm.)

investigation for the purpose of ascertaining the weight of the coal that was checked in or upon the barges, or whether coal had been weighed before it was placed on the barges.

I knew a man by the name of Sawden, who was at one time chief engineer on one of the boats of the Pacific Mail Steamship Company, but I do not recall receiving notice from him of a shortage. I would say that I did not receive such notice. I do remember receiving such a notice from a man named Hamilton, who was chief engineer on one of our boats. I should judge that was in 1911 or 1912. I also received notice from a man named Bunker, who was chief engineer on one of our boats. I do not remember receiving notice from Chief Engineer Sullivan. After receiving these notices I did not endeavor to ascertain whether the coal discharged [388—333] from the barges was weighed before being so discharged. I remember a man named Blake being once in the employ of the Pacific Mail Steamship Company. He is stenographer in my office. Boats are not very often coaled at night. Sometimes boats are coaled from both sides at the same time and from different barges, one on either side; and, of course, when that occurs, it is impossible for one man to watch operations upon both sides of the ship.

Recross-examination by Mr. McCUTCHEN.

After receiving the reports that the Pacific Mail Steamship Company was not receiving full weight on the deliveries of coal to its liners I made certain investigations. I could not find any proof that we

(Testimony of William Chisholm.)

were short, and, of course, it was my duty to know whether we were short or not. I watched the operations of the barges very closely, and I also looked over the performance of our ships to see whether they were running short of coal in any way. I would examine, for instance, the log sheet of the ship, which shows the consumption of coal on each voyage, and also shows the quantity of coal delivered to the ships and the quantity that was in the ship's bunkers before the voyage began. My experience was such as to enable me to tell about what the consumption of coal on a given voyage would be. Using all of that information, and making the investigation which I have said I did make, I reached the conclusion that the Pacific Mail Steamship Company was not paying for any more coal than it was actually receiving. The complaint that came from Engineer Hamilton, to which I have heretofore referred, was in writing.

(Admitted by counsel for the prosecution that the copy of a letter produced by counsel for the defendants is a copy [389—334] of the letter which was written by Engineer Hamilton to the witness, and which is last hereinabove referred to.)

The letter which I received from Engineer Hamilton was a communication, not a complaint. The letter which you now show to me was the communication. I think I received another complaint from Hamilton other than the one you show me.

(The communication here referred to was here read in evidence, and is and was in the words and figures following:)

(Testimony of William Chisholm.)

“S. S. ‘Siberia.’

“Honolulu, January 31st, 1910.

“Wm. Chisholm, Esq.,

“Marine Superintendent, P. M. S. S. Co.

“Dear Sir:

“I cannot give you a correct report as to the quality of the Australian coal from here, as the bunkers we had to use from the Australian and Wellington coal were mixed, but as a whole the coal is much better than last voyage.

“We will have about 1200 tons of the Australian coal on hand leaving here that I can use separately so I can send you a correct report as to its quality from Yokohama.

“Our average daily consumption was 160 tons, but I have to log 7 tons per day more to bring the bunkers square, as from the amount we were charged with fully 100 tons of rain water went in with the coal.

“Everything worked splendidly all the way down; hadn’t any trouble whatever, and at [390—335] present everything in the department is in good order.

“Yours respectfully,

“(Signed) J. S. HAMILTON,

“Chief Engineer.”

I cannot say exactly from memory, without looking at the records, how much coal Hamilton’s steamer had on her when she left San Francisco. It would be, I should think, about 2,000 tons. The vessels were taking all the way from 1,500 to 3,300 tons. If there had been a system of short-weighing con-

(Testimony of William Chisholm.)

stantly and persistently pursued on the deliveries of coal to the Pacific Mail Steamship Company, such short-weighing would certainly have shown in the logs of the steamers, and especially on the smaller ships where it would have been detected very readily. To the best of my knowledge I received only two complaints about short weighing since 1907. The complaints were not general in their character. They referred to particular steamers on particular trips. The steamers were the "Manchuria" and the "Siberia."

Once or twice when coal was being laden into our liners at night I was present for the purpose of seeing how the coal was handled and whether our men were at their stations. Those visits of mine occurred, I think, in 1911, and they were with reference to the complaints or communications hereinbefore referred to. I went there quietly, not making my presence known, because I wanted to see whether there was anything wrong in the operation of coaling. On each occasion, I remained an hour or half an hour. I discovered nothing wrong on either occasion. In the years 1911 and 1912 I had the scales on the barges tested perhaps a dozen times off and on. The tests were made on or about the time that I received the complaint from Engineer Hamilton. [391—336] I know also that those scales were tested from time to time by the Government. We paid for coal on the Government weights on all occasions.

Further Redirect Examination by Mr. ROCHE.

There is no question that even though the scales

(Testimony of William Chisholm.)

had been tested, the coal would still not be properly weighed unless the buckets which had been weighed fairly represented the average buckets of coal discharged into the steamship. I said on recross-examination that I went down to the steamers at night in connection with the complaints that I had received. The occasions when I went down there were in 1911. It is true that the first complaint I received was around 1908 or 1909. The reason I waited two years before going down to the dock at night to find out whether the coal had been properly handled was that I was satisfied when I received the first complaint that there was absolutely nothing in it.

Mr. ROCHE.—Q. You did testify, did you not, Mr. Chisholm, that the only complaints you received regarding the short-weighing of coal, or short-weighting, were two complaints? A. Directly.

Q. Yes, directly; we will come to the indirect complaints in a few moments. And you remember, do you not, in response to a question put to you by Mr. McCutchen, testifying that the reason why you went down to the dock in 1911 was because of the complaints and the communications; do you remember that? A. Yes, sir.

Q. And did you not Mr. McCutchen in the same question use the word “communications”?

A. Yes, sir.

Q. Did you receive any more than two communications to your [392—337] knowledge regarding these complaints of shortages? A. No, sir.

Q. Then when Mr. McCutchen put that question to

(Testimony of William Chisholm.)

you, you understood, did you not, that the number of communications to which he was referring was two; is not that correct? Is not that correct, Mr. Chisholm?

A. Well, I could not say that that is correct. What I figured on was Hamilton's complaint.

Q. Did you not, in response to a question put to you by Mr. McCutchen, in which he referred to the words "complaints" and "communications" understand him to mean, or to refer to rather, the two complaints and two communications?

A. I referred to them as the one complaint on the "Siberia."

Q. One complaint from the "Siberia"; why did you not so state in your answer to the question propounded to you by Mr. McCutchen?

Mr. STANLEY MOORE.—That is objected to as argumentative. The testimony speaks for itself.

Mr. ROCHE.—I won't press the question because I agree with counsel that his testimony does speak for itself.

Mr. STANLEY MOORE.—Yes, it does. His testimony is certainly very plain.

Mr. ROCHE.—Q. Now, getting back to the logs kept by Chief Engineers, and to which you have referred, the Chief Engineer upon these boats takes the weights as they are furnished to him by the Pacific Mail Steamship Company as to the quantity of coal laden into the bunkers? A. Yes, sir.

Q. In other words, take the "Manchuria," for instance, when the "Manchuria" is loaded with coal

(Testimony of William Chisholm.)

at this port the quantity of coal which is supposed to be laden upon her or discharged into her bunkers is turned over to the engineer; is not that correct?
[393—338]

A. At this port, and we take the engineer's word as to what is in the ship.

Q. You take the engineer's word as to what is in the ship, and then you give to the engineer the quantity of coal your assume has been laden into the bunkers? A. Yes, on a certificate.

Q. On a certificate furnished by whom?

A. By the Pacific Mail.

Q. In other words, so far as the engineer is concerned, the only knowledge he has as to the quantity of coal discharged into the boat at this port would be the weight given him by the Pacific Mail Steamship Company; is not that true? A. Yes, sir.

Q. In other words, the engineer does not go into the bunkers after the boat has completed coaling for the purpose of measuring the coal to determine how much coal he has in the bunkers; that is also true, is it not?

A. Well, that is up to the engineer. I cannot—

Q. (Intg.) Is it not a fact—

Mr. McCUTCHEN.—You don't let him answer, Mr. Roche. You are awfully rapid this morning.

Mr. ROCHE.—Q. You say that is up to the engineer? A. Yes, sir.

Q. Don't you know, as an expert,—and counsel has cross-examined you as an expert,—that it would be impossible for an engineer to go into the bunkers

(Testimony of William Chisholm.)

after the boat has coaled for the purpose of measuring the coal? A. No, sir.

Q. Did you ever know of a chief engineer to do that? A. Yes, sir.

Q. Is it ordinarily done by him? [394—339]

A. It all depends what ship it is and the kind of bunkers you have.

Q. And it depends to a great extent also on the shape and the location of the bunkers, too, whether the bunkers are accessible, does it not?

A. Yes, sir.

Q. And it is also true that on a number of these big boats the engineer cannot get into the lower bunker until the coal is taken out of the upper bunkers; is not that true? A. Yes, sir.

Q. So that it is true, especially with reference to the big boats controlled by the Pacific Mail Steamship Company, that the chief engineer relies exclusively on the weights given to him by the Pacific Mail Steamship Company?

A. On the small ships, yes, but not upon the large ones.

Q. Why not?

A. Because you can get into your bunkers on the large ships the next morning or on the afternoon that you stop coaling. You take the coal from the bottom. The condition of the bunkers is entirely different on the large ships from what it is on the small ships. If the coal on the "Mongolia"—the ship I was familiar with—if they finished coaling to-day, this morning I could go in those top bunkers

(Testimony of William Chisholm.)

and measure up if there was any shortage.

Q. Could you go into the bottom bunkers?

A. There are no bottom bunkers in the after end of the ship. There is only one bunker, that is a bottom bunker. The rest of them are on the up-deck. There are no bunkers in the hold of the ship of any size, except the forward main bunkers.

Q. Don't you know as a matter of fact, Mr. Chisholm, that the chief engineer, so far as this port is concerned, upon all of the boats of the Pacific Mail Steamship Company relies upon the [395—340] weights furnished to him by the company for the purpose of determining the quantity of coal which he has in the bunkers at the time the boat leaves this port?

A. If he is on to his job he ought to satisfy himself. I have always went into the bunker after coal-ing the ship.

Q. You say if he on to his job; don't you know that that has been the practice of engineers in the employ of the Pacific Mail Steamship Company to rely on the weights given to them by the Pacific Mail Steamship Company relating to the quantity of coal laden into the ship at this port?

A. On some ships possibly.

Q. Don't you know that so far as the daily consumption of coal is concerned that the log contains an average and is based upon an average?

A. Yes, sir.

Q. You know, do you not, Mr. Chisholm, that when the boat reaches we will say the port on the

(Testimony of William Chisholm.)

other side, that then for the first time the engineer goes into the bunkers and estimates the quantity of coal he has on hand?

Mr. McCUTCHEN.—Do you mean the first time after leaving this port?

Mr. ROCHE.—Yes.

A. No. He ought to go in every day, or twice a day.

Q. You say he ought to go in? A. Yes, sir.

Q. Is it not a fact that the log is made up in this way: That the engineer figures out the coal he has in the bunkers at his home port; that he then figures out the quantity of coal he has in the bunkers at the other port, and after making the subtraction between the two he figures out the time consumed in the journey and fixes the daily consumption of coal?

A. He would be a very careless engineer, and he would be liable [396—341] to get caught almost any time if he figured that way.

Q. Don't you know that that is practically always done? A. No, sir, not on a big ship.

Q. And don't you know that they all do it?

A. No, sir. The engineer coming into this port, the termination of the voyage at Pt. Bonita, the voyage stops there, and from Pt. Bonita until he goes out to Pt. Bonita it is port consumption.

Q. And the daily average of port consumption is usually ascertained at either end of the voyage; is not that true? A. Yes, sir.

* * * * *

(Testimony of William Chisholm.)

Q. Now, getting back to this complaint or this communication as it was referred to by Mr. McCutchen, signed by J. S. Hamilton, on the 31st day of January, 1910, you, of course, read that language, did you not, which is contained in this letter in which it is said: "Our average daily consumption was 168 tons, but I have to log 7 tons per day more to bring the bunkers square as from the amount we were charged with fully 100 tons of rainwater went into the coal." Of course, as marine superintendent of the Pacific Mail Steamship Company you did not intend to permit your employers to pay for rainwater, did you?

A. I don't see how we could stop it.

Mr. ROCHE.—Q. Well, did you, after receiving this document which Mr. McCutchen designates as a communication and which I designate as a complaint, make any complaint to the Western Fuel Company seeking a return of that portion of the money paid to it representing the 100 tons of rainwater?

A. I respectfully referred that to our manager who handles those cases. [397—342]

* * * * *

Q. Directing your attention for a moment to these logs upon which you were examined on cross-examination—by the way, Mr. Chisholm, the "Siberia" is a big boat, is it not? A. Yes.

Q. And Mr. Hamilton was on the "Siberia," was he? A. He was, and is at present.

(Testimony of William Chisholm.)

Mr. McCUTCHEN.—Is that written from the “Siberia”?

Mr. ROCHE.—It is.

Q. I want to call your attention to these averages. “Our average daily consumption was 168 tons.” I will ask you if it is not a fact that the log kept by Mr. Hamilton on that particular trip of that particular steamer would show simply the average daily consumption of coal.

* * * * *

A. It should show closely.

Mr. ROCHE.—Q. Just calling your attention to a little more of the language contained in this letter, “but I have to log 7 tons per day more to bring the bunkers square”; now, it is a fact, is it not, that at least in this instance, which shows a report made by the chief engineer upon one of the big boats, he did so fix the log of that boat that it did represent simply a general average of the coal consumed per day, including 7 tons of coal which she did not consume at all; is not that correct? A. Yes, sir.

Q. So at least so far as this particular boat is concerned the general average referred to by me some time ago was pursued. A. Yes, sir.

Q. And the chief engineer in this particular instance did find out his shortage of coal at the end of the journey and did take the shortage into consideration in fixing the daily consumption [398—343] of coal in the log.

A. That was only a short portion of the voyage,—Honolulu; that is only one-sixth of the voyage.

(Testimony of William Chisholm.)

Q. At any event, he did do that so far as the log is concerned on the journey of that ship from San Francisco to Honolulu. A. Yes.

Mr. McCUTCHEM.—Mr. Roche, will you enlighten us by showing us how the engineer could have done that and not take a measurement of his bunkers?

Mr. ROCHE.—Q. And so there will not be any confusion about the matter, Mr. Chisholm, because of the suggestion just made by Mr. McCutchen, the engineer did take into consideration the weight of the coal given to him by the Pacific Mail Steamship Company at this port, and he measured the coal in his bunkers at Honolulu, and determined that there was a shortage, and averaged the daily consumption of coal, including the shortage, and placed that daily consumption in the log; is not that correct? A. Yes; that is the way it looks there.

Mr. ROCHE.—So far as I am concerned, may it please the Court, and I simply make this statement in response to the suggestion of counsel, I have never seen this letter before; and these books were brought here under subpoena and are located in the other room.

Q. I call your attention to a letter or a communication dated at Honolulu, January 29, 1909, and ask you if that is the communication which you received from Chief Engineer Bunker at that time?

A. Yes.

Q. And that is the postscript to which you referred, is it? A. Yes. [399—344]

(Testimony of William Chisholm.)

Mr. ROCHE.—We offer this letter in evidence:

“PACIFIC MAIL STEAMSHIP COMPANY.

“Voyage 18, at Honolulu.

“January 29, 1909.

“Subject: Shortage of Coal Received at
San Francisco, Voyage 18.

“W. Chisholm, Esq.,

“Marine Superintendent, P. M. S. S. Co.

“Dear Sir:

“Please be advised that in coaling at S. F. we received all coal taken on board in reserve bunker and drew from main bunkers for port use. Have weighed samples of the coal supplied in S. F. and find it runs 41 cubic feet per ton (when allowed to partly dry out); by allowing this average, we are still 123 tons short. This shortage I have charged to port consumption at S. F., making 309 tons in place of 186 tons as actually burned.

“Respectfully,

“W. L. BUNKER,

“Chief Engineer.

“P. S. Cannot report on quantity of coal as we have been using”—

(Addressing the witness.) Is that quantity or quality in the postscript? It refers to certain Japanese coal that you know more about than I do.

A. (Reading.) “P. S. Cannot report on quality of coal as we have been using Takasima and Tagawa on passage down.”

* * * * *

Q. By the way, upon cross-examination you testi-

(Testimony of William Chisholm.)

fied in response to some questions put to you by Mr. McCutchen that these complaints [400—345] that you received regarding a shortage of coal related to specific instances and particular steamers; is that correct? A. Yes.

Q. In each instance? A. Yes.

Q. Now, so that there won't be any more confusion between counsel and none between yourself and myself, is that statement accurate when you take into consideration what you have heretofore referred to as indirect notification of shortages?

A. No, sir.

Q. It is not? A. No.

Q. So that the indirect notices which you received from time to time related to a general overweighing of coal, isn't that correct, and not to specific instances?

* * * * * * * *

A. I received, I think, on two occasions, one or two occasions, indirectly an insinuation that we were getting a short amount of coal on our ships.

Mr. ROCHE.—You say that you received directly—

A. (Intg.) Indirectly. It was an indirect insinuation, it was an insinuation that we were getting a short amount of coal.

Q. Isn't it a fact that you received a direct statement from David S. Powers, to the effect that the Pacific Mail Steamship Company was being overweighed upon coal? A. Not directly.

Q. What do you mean by "not directly"?

(Testimony of William Chisholm.)

A. When David Powers came out of jail he came to me to appeal for his father and himself to coal our steamers. He was down seeing me on one or two occasions; that is, I should judge, in 1912, after he got out of Alameda County Jail. I told Mr. Powers the last time, I says, "You put yourself on record." He told me that [401—346] he could, if him and his father could get the coaling back, that he would save the Pacific Mail Company a great deal of money, and he would get more coal in the bunkers than at the present time was getting in.

Q. When was that?

A. That was, I should judge, around, shortly before the indictment of Mr. Donaldson, around, I should judge, in August.

Q. August of what year? A. I think last year.

Q. Now, he did tell you—you don't mean the present year? A. No, 1912.

Q. So that you were told at that time, were you not, by him, that there had been overweighing of coal?

A. Not directly. When I put the question to him directly for his information, he said, "Well," he shrugged his shoulders and walked away.

Q. And that was some time in 1912; is that correct? A. 1912.

Q. From what other sources did you indirectly receive information that there was a general overweighing of coal?

A. That same year, I should judge it was, around about the spring, his brother, Eddie, came to me and

(Testimony of William Chisholm.)

wanted to get his father back in the coaling business, that is, trimming the coal, and he intimated, he did not come right out directly, and when I told him, I says, "What have you to show for this"? he says, "Well, if we get our coaling back, if we could get coaling our ships, or your ships, we could save you a whole lot of money, on the storage of coal."

Q. That was in the early part of 1912; is that correct?

A. No, I don't remember exactly when it was; it was shortly, I should judge, before Dave was down there. [402—347]

Q. Now, after having received those two communications to which you have referred, the written communications, and these indirect charges that the coal was being overweighed, did you at any time attempt to find out at what weight the coal was laden into the barges? A. No.

Recross-examination by Mr. McCUTCHEN.

During the time that I have been marine superintendent of the Pacific Mail Steamship Company the company has had in commission 17 or 20 liners. Four are large steamers, three intermediate size ships, and about fourteen small ones. Of that entire number about four large liners have bunkers so situated that the contents can be ascertained after the ship has coaled. Those four large ships have made on the average four and a half voyages a year during the time I have been marine superintendent. That would be in five years approximately 22 voyages for each of those four steamers, or 88 voyages in the

(Testimony of William Chisholm.)

aggregate. I have received in all those 88 voyages 2 complaints with reference to the deliveries of coal to the steamers by the Western Fuel Company. I have said that with the exception of the reserve bunker on the "Mongolia" and "Manchuria," those large steamers have their bunkers so placed that the chief engineer can measure the coal in the bunkers after the loading is complete. The capacity of the reserve bunker is known. It ought to be quite easy to tell after the coaling operation is completed whether or not the reserve bunker has been filled to its capacity. Therefore, knowing the capacity of the reserve bunker, and so being able to tell whether it has been loaded to its capacity, and it being possible to get at the other bunkers on those ships, there is no difficulty whatever in an engineer [403—348] being able to determine the amount of coal that he has on hand before his ship sails. If there had been a system of short-weighing pursued in the delivery of coal to the smaller steamers there would, during all the time I have been marine superintendent, have been no difficulty in discovering that fact.

Mr. McCUTCHEN.—Q. The letter from Chief Engineer Bunker, which has been called to your attention, says, among other things, "This shortage I have charged to port consumption at San Francisco, making 309 tons, in place of 186 tons as actually burned." Did you make any investigation after receiving that communication, for the purpose of determining how the port consumption which the chief engineer refers to in his letter, compared with

(Testimony of William Chisholm.)

his port consumption ordinarily? A. Yes.

Q. I don't know whether I understand it correctly, but I did get the understanding from this communication that he has charged 309 tons to port consumption. Is that the way you understand it? A. Yes.

Q. Will you take the communication? A. Yes.

Q. Did you make any investigation to determine about what his port consumption should have been for the time he was in port on that occasion?

A. Yes.

Q. What did you determine that he should properly have consumed in port during that time?

A. 225.

Q. 225 tons? A. Yes.

Q. Then you don't think he could have possibly got along with 186 tons during his stay in port on that occasion? A. No.

Q. Assuming that he had reported 225 tons as his port consumption during that stay, would not that consumption have been exceedingly [404—349] small for the time he was in port? A. The 225?

Q. Yes. A. No, it would be about right.

Q. It would be about right? A. Yes.

Q. Did you make any investigation, after receiving that complaint, to determine how Chief Engineer Bunker's consumption of coal on that voyage compared with his consumption of coal on other voyages? A. Yes.

Q. What was the result of that investigation?

* * * * * * * *

(Testimony of William Chisholm.)

A. The voyage was lower than the previous voyage.

Mr. McCUTCHEN.—That is to say, according to the log of Captain Bunker on that voyage on which he complained of having been short-weighted, he made a better record than he had ever made before on any previous voyage. A. Yes.

Q. That is to say, his consumption of coal was less per mile than on any voyage he had previously made?

A. The gross amount of coal, the total amount of coal he received during that voyage, was less.

Q. The total amount of coal he received during that voyage was less. A. Yes.

Q. Did he get all of his coal for that voyage at San Francisco? A. No.

Q. Where else did he get coal?

A. Nagasaki, I think, and I don't know if he took any at Honolulu or not.

Q. At any rate, when he returned here, he reported to you the coal which he had received at foreign ports? A. Yes.

Q. And you took that into account in reaching the conclusion which you have announced here, that he had made a better record [405—350] on that voyage than he ever had made during any previous or subsequent voyages? A. Yes.

Q. Now, you have said that the capacities of these steamers which you have designated as "medium size" and "small" is ascertainable easily. Let me ask you whether you ever received any complaint during the five years that you were marine superin-

(Testimony of William Chisholm.)

tendent of the Pacific Mail Steamship Company from any captain of one of those medium-sized or small steamers, as to the quantity of coal delivered to the steamer? A. No.

Q. You never did? A. No.

Q. Did you ever receive any such complaint from the chief engineer of any one of those medium-sized or small boats? A. No.

Q. You say that from the letter of Chief Engineer Hamilton you take it that he had determined his daily average after he had reached the port of Honolulu. Don't you gather from that letter that he actually went into his bunkers and made a measurement to determine their contents at that time?

A. I should judge he would; I assume he would.

Mr. ROCHE.—I assume so at Honolulu.

Mr. McCUTCHEN.—Q. That is to say you said that was about one-sixth of the voyage, didn't you?

A. The voyage is about 15,000 miles, and that is 2100.

Q. That is 2100 miles? A. Yes.

Q. Ordinarily the ships do not coal at Honolulu, do they? A. They do now, yes.

Q. They do now. Has that been the practice during all of your superintendency?

A. Some of the ships, yes.

Q. They take on comparatively little there, don't they?

A. Well, they take from 300 to 500 or 600 tons.

Q. Out of a total capacity of how much, that is, I speak of those [406—351] large steamers?

(Testimony of William Chisholm.)

A. 3300, or about that; 3300 or 3200.

Q. You don't know whether on this particular voyage the "Siberia" took on any coal at Honolulu?

A. No, at least I think—it is stated there in the communication—didn't he state that he received some coal at Honolulu?

Q. I have forgotten that if he did.

A. I don't think they took very much coal there at that time.

Q. I don't understand that he says that, Mr. Chisholm. That letter may mean more to you than it does to me. (Handing.)

A. No. I could not say. That is misleading, because he says he had 1500. You would have to look at his records.

Q. At any rate, you can't tell from the letter, itself, whether he coaled at Honolulu?

A. No, it is misleading.

Q. Do you know how the chief engineers get at the daily consumption of coal?

A. Well, there are different ways.

Q. State whether or not, from your experience, both as a chief engineer and as marine superintendent, you know that the chief engineer makes an entry in his log daily of what he assumes to have been the consumption of coal for the previous day.

A. Yes.

Q. Now, that averaging which counsel has interrogated you about, if there is any averaging, is made at the end of the voyage, isn't it, as a rule?

A. Well, the average is made from here to Hono-

(Testimony of William Chisholm.)

lulu, and from Honolulu to Yokohama, and then you would have to average from Yokohama along the coast. It is very difficult to say how much you are consuming along the coast.

Q. What is that, because you are in port more or less? [407—352]

A. You are in port a great deal.

Q. But when you are actually under way, the chief engineer knows about what his consumption should be from day to day, does he not?

A. He should be very close to it; he might be off.

Q. He would not be off very much.

A. He should not be off over 15 tons.

Mr. ROCHE.—Q. A day?

A. It depends how much he is burning. If you burn 150 or 200 tons a day, it is quite easy to be out 10 tons or 15 tons.

Mr. McCUTCHEN.—Q. Ordinarily, and I suppose invariably, the Pacific liners coal here before they leave for the Orient, do they not? A. Yes.

Q. Now, having coaled here, what is their next coaling station in the ordinary course of events?

A. Honolulu.

Q. Where do they coal after coaling at Honolulu?

A. Yokohama.

Q. Where next? A. Nagasaki.

Q. And then? A. Back to Nagasaki.

Q. Back to Nagasaki? A. Yes.

Q. Where do they go from Nagasaki; you say back to Nagasaki?

A. From Nagasaki to Manila, and to Hong Kong,

(Testimony of William Chisholm.)

Shanghai, to Nagasaki, to Kobe, and then to the tea ports, Catmitsu.

Q. She coals at San Francisco? A. Yes.

Q. And ordinarily at Honolulu? A. Yes.

Q. And at Yokohama? A. Yes.

Q. And at Nagasaki twice? A. Yes.

Q. On each voyage? A. Yes.

Q. Does she coal at Yokohama again?

A. Yes, some of them.

Q. Does she coal at Honolulu again? A. Yes.

Q. And then comes on to the port of San Francisco? A. Yes. [408—353]

Further Redirect Examination by Mr. ROCHE.

Q. Of course, it is true, is it not, Mr. Chisholm, that the amount of coal which a boat burns during a given journey depends to a great extent upon the character of the weather with which the boats have to contend?

A. Yes, and the voyage out from drydock.

Q. And of course, these daily averages estimating the consumption of coal each day are frequently made by the engineers without going into the bunkers at all, that is, by other tests; that is correct?

A. Yes.

Q. By building, for instance, a box alongside of the fire-room, or alongside the fire-room, in which a certain quantity of coal is put and tests made from that?

A. Yes, but it is not practical.

Q. What is that?

A. It is not practical, on account of the amount

(Testimony of William Chisholm.)

you use; that is all right on a small steamer, but in a big boat you use too much coal, you have not got the room.

I ordinarily receive the money contributions to which I have testified from the defendant Mills. That was always the case. He followed the same procedure last year after these indictments were found. The contributions are made in money invariably, not by check. No receipt is asked or given. I don't remember ever receiving any money and turning it over to any other employee of the Pacific Mail Steamship Company. When I wanted coal at my home I would order it from Mr. Mills. I don't remember any bill ever being sent. I might sometimes have ordered coal through Eddie Powers, at that time one of the employees of the Western Fuel Company. I don't remember [409—354] ever ordering coal from anybody else.

Further Recross-examination by Mr. McCUTCHEN.

I think I burned a ton and a half of coal a year, the value of which at wholesale would be twelve or fourteen dollars.

[Testimony of D. C. Norcross, for the Government (Recalled)].

D. C. NORCROSS, recalled for direct examination for the purpose of laying further foundation for the testimony of the witness, W. H. Tidwell, testified as follows:

The Western Fuel Company had written contracts with the Government of the United States for the supply of coal to transports during the years 1906 to

(Testimony of D. C. Norcross.)

1912, inclusive. The supply of coal by said Western Fuel Company to other vessels belonging to the United States was governed merely by open agreements. The written agreements for the coaling of the transports covered an entire year. I have had my bookkeeper draw off a list of the contract prices of coal furnished the transports under these agreements from year to year. The coal so supplied was average coal, that is to say, coal in the same condition as it would be on importation into the port of San Francisco. The contract price for the fiscal year 1905-1906 was \$6.25 delivered; at the bunkers it was \$5.75, there being a 50¢ lighterage charge. For the year 1906-1907, we did no business, and had no contract with the Government. For the year 1907-1908 the price was \$6.85 delivered, with 65¢ lighterage charge to be subtracted therefrom; for the year 1908-1909, the same; for the years ending June 30, 1910, and June 30, 1911, we had no contract. The last contract we had was for the year ending June 30, 1912, and the contract price for that fiscal year was [410-355] \$6.90, delivered with 50¢ off for lighterage. We had no contract price for the fiscal year 1912-1913.

So far as United States boats, other than transports, were concerned, the average price of coal charged would be about \$6.50 at the bunkers.

The Western Fuel Company had merely verbal agreements with the Pacific Mail Steamship Company for the supply of coal to that company from April 1st, 1906, to and including the year 1912, and

(Testimony of D. C. Norcross.)

that would be true also for the period between January 1, 1904, and April 1, 1906. The price paid by the Pacific Mail Steamship Company changed, I think, three times during those years. I have a record of the prices paid. They were \$5.75 at the bunkers and \$6.25 at the bunkers; when the changes were made I don't recall. 50¢ lighterage would have to be added for the coal when delivered. The kind of coal was average, and, as I have said, there were no written contracts. In a few instances the Western Fuel Company during the same general period of time delivered coal via barges to vessels of the Pacific Mail Steamship Company and of the Oceanic Steamship Company and of the American-Hawaiian Steamship Company. I think the coal to all these companies was sold under open agreements. I think the price, paid by these various companies would average \$6.50 at the bunkers, with a lighterage charge of 50¢ to be added at the point of delivery. Other coal sold by us to other vessels would be at approximately the same price.

The office of the Western Fuel Company at Nanaimo from time to time sent accounts to the office of the Western Fuel Company at San Francisco for Nanaimo coal exported from British Columbia into San Francisco. These bills were received at [411—356] the San Francisco office whenever a shipment was made. They were mailed at the time of the shipment. A bill was sent for every carload of Nanaimo coal thus imported into San Francisco, and

(Testimony of D. C. Norcross.)

they have been coming ever since we have been in business.

Q. I call your attention to a bill dated at Nanaimo, B. C., the 25th of October, 1907, "Messrs. Western Fuel Company, San Francisco, California; bought of Western Fuel Co. 3788 tons New Wellington Coal, 3.75, \$14,205. 3866—1420 per SS. Hornelen; charge Coal account S. F. O. K. G. M. M." Do you recall receiving that bill?

A. I don't recall receiving this particular bill. It undoubtedly came to the office, though.

Q. And the figures in black ink, 3788 tons, New Wellington Coal, 3.75, \$14,205, of course, were the figures and the letters upon that bill at the time it was received? A. Yes.

Q. None of the interlineations in red ink were upon the bill at that time? A. No.

Q. And that is the weight of the coal as indicated by the bill sent to the Western Fuel Company's office at San Francisco from its office at Nanaimo; is that correct? A. That is correct.

Q. Showing the weight of coal loaded upon the boat? A. Yes.

Q. The red ink interlineations show the out-turn weight at this port; is not that correct?

A. That is correct. [412—357]

Q. Now, I direct your attention to a letter dated October 28, 1907, and ask you to look at that letter and state whether that letter was received at this office with that bill?

* * * * *

(Testimony of William Chisholm.)

A. It undoubtedly was.

Q. And the figures "3788 tons New Wellington Coal" contained in black ink upon this billhead not only show the weight of coal loaded into the ship but also shows the invoice weight, does it not?

A. Yes.

Q. In other words, those figures in each instance agree with the invoice weight and the bill of lading weight? A. Yes.

Q. Is it not a fact that the Western Fuel Company was charged, as indicated in this letter, with 100 tons more coal than was specified in the bill of lading?

A. It would appear so from that.

The letter last above referred to was presumably received by me in San Francisco, but I do not recall taking the matter presented in it up with any of the officials of the Western Fuel Company. I do not think I received any subsequent bills showing that the Western Fuel Company had been charged with 100 tons more coal than was specified in that bill. I cannot remember asking for any explanation as to why the company should have been charged with 100 tons of coal more than was specified in the invoice or bill of lading. The letter was handed to the book-keeper when it came. I do not remember doing anything else with it. In reply to the question whether there were any books kept by me in my office in which entries were made by me from time to time as to the weight of coal charged against us by [413—358] the Nanaimo office irrespective of the invoice or bill of lading weight, or out-turn weight, I would say

(Testimony of D. C. Norcross.)

that the only weight we took account of down here was the out-turn weight of the Government. In addition to bills which accompanied each shipment of coal from Nanaimo, we received from the Nanaimo office regular monthly statements showing the total amount of coal shipped here from that port during the month. These statements did not show the individual cargoes. They gave merely the total quantity billed to us during the month. These statements were always adjusted to agree with the out-turn weights at San Francisco. The adjustment was made at Nanaimo. We would report back the out-turn weight to them for the purpose of this adjustment, and the adjustment would be made there irrespective of any over-weight or under-weight that might be discovered down here.

(The letter hereinabove referred to was then offered in evidence, and reads as follows:)

“Letter 989a.

“D. C. Norcross,

“Secretary Western Fuel Company,

“San Francisco, Cal.

“Dear Sir:—

“S. S. Hornelen. Please note we have charged you with 3788 tons, 100 tons more than bill of lading figures.

“Yours truly,

“MARK BATES, Jr.,

“Cashier.”

I do not remember ever asking any explanation as to why the Western Fuel Company was charged with

(Testimony of D. C. Norcross.)

100 tons more than was specified in the bill of lading.
[414—359]

Q. In the same bundle of statements or letters, Mr. Norcross, I show you another bill which I suppose will be susceptible of the same explanation.

“Nanaimo, B. C., October 31, 1907.

“Messrs. Western Fuel Company,

“San Francisco, California:

“Bought of Western Fuel Company 5,698 tons New Wellington Coal, 3.75, \$21,367.50.”

And that is changed to read “5,635 tons, 1010 lbs. \$21,132.94 per S. S. Torgenskjold. Consigned to Spreckels Brothers Commercial Company, San Diego, Cal. Charge Coal account S. F. O. K. G. M. M.” San Diego, California.

And here is the letter:

“D. C. Norcross, Esq.,

“Secretary Western Fuel Company,

“San Francisco.

“November 15, 1907.

“Steamship ‘Hornelen.’

“Dear Sir:

“Please note we have charged you with 6,265, 100 tons more than bill of lading figures.

“Yours truly,

“MARK BATES, Jr.,

“Cashier.”

Do you remember receiving that letter?

A. I don't recall that letter particularly.

Q. Is it not a fact that letters of that kind were received by you from time to time from the Nanaimo

(Testimony of D. C. Norcross.)

office, showing that a larger amount of coal had been placed by the Nanaimo office on these boats than was specified in these letters?

A. It appears that way from these letters, yes.

Q. Do you now state you have no recollection concerning these matters?

A. I stated I undoubtedly received the letters. I cannot recall the particular letters coming in at this time. [415—360]

Q. Don't you remember receiving those letters, Mr. Norcross, at your office down here, and of having conversations in relation to these letters with the defendants, or some of the defendants, in this case, conversations regarding those letters?

A. I cannot recall those letters or where we have so done.

Q. You cannot recall it?

A. No, not at this time.

Q. I will ask you if it is not a fact that upon every bill received from the office at Nanaimo since 1908, to and including 1912, the bill upon its face disclosed that there was more coal placed upon the boat than was specified in the invoice or bill of lading.

A. I know there have been many times differences; whether every bill shows that, or not, I don't know.

Q. And was not that matter ever taken up and discussed?

A. I don't remember of discussing it with any one.

Q. Or by anybody?

A. No, not that I recall.

(Testimony of D. C. Norcross.)

Q. Did you ever endeavor to ascertain why that was done? A. No, I did not.

Q. You knew, did you not, that monthly statements furnished to you from the Nanaimo office contained the actual quantity of coal as specified in the bill?

A. No. I told you that the monthly statements from there contained the same amount that the out-turn weight showed here. They were adjusted to agree with the out-turn.

Q. That is, as I understand it, after a cargo was discharged you would return the out-turn weight to the Nanaimo office, and the statement you would then receive from the Nanaimo office would be in conformity with your out-turn weight. A. Yes.

Q. And did you not ever receive any statement from the Nanaimo [416—361] office outside of these bills showing the actual quantity of coal loaded on those boats from time to time and imported into this port?

A. No, they never sent such a statement.

* * * * *

Q. I direct your attention to a bill dated "Nanaimo, B. C., 26th of September, 1908: Messrs. Western Fuel Company, San Francisco, California. Bought of Western Fuel Company. 5,647 tons New Wellington Coal, 3.75, \$21,176.25. 5,749 tons, 560 lbs.

That is correct, is it not? A. Yes, sir.

Q. So that the out-turn weight here shows that there was at least two tons more coal in that boat than was specified in the invoice or bill of lading

(Testimony of D. C. Norcross.)

weight; is not that correct?

A. It is more than that, it is 102 tons more out-turn than was billed.

Q. Now, I will ask you if it is not a fact that down at the bottom of the bill appears in black type the following: "Actual weight of this cargo 5,822 tons"; that is correct, is it not? A. Yes, sir.

Q. An overage of how many tons?

A. An overage on what?

Q. An overage between the bill of lading or invoice weight and what is here specified as the actual weight. A. 175 tons.

Q. Well, approximately 175 tons, is it not?

A. Yes, 175 tons.

Q. Is it not a fact, Mr. Norcross, that the bill upon its face shows that there was loaded into that vessel 5,822 tons of coal, whereas the bill of lading or invoice which was sworn to before [417—362] the United States Consul showed that there was only 5,647 tons? A. Yes.

Q. And when that coal was discharged in the port of San Francisco there apparently was discharged 102 tons more coal than was specified in the bill of lading or invoice; that is correct, is it not?

A. That is correct.

Q. But less coal by a number of tons than is specified in this bill to have been the actual weight of the coal deposited in the boat? A. Yes.

Mr. ROCHE.—I want to call the juror's attention to this with reference to the table that has been introduced in order to account for these overages. I

(Testimony of D. C. Norcross.)

direct your attention to the table appearing on page 18.

* * * * *

Mr. ROCHE.—This exhibit is already in evidence. On page 18 of Table A of “U. S. Exhibit No. 125” it shows October, the “Torgenskjold,” the invoice weight was 5,647 tons; the ascertained or out-turn weight was 5,749 tons, 560 lbs. There was an overage, an apparent excess of coal discharged beyond and above the bill of lading or invoice weight of 102 tons, 560 lbs. I would like to have the jury look at this.

Q. Mr. Norcross, all of the interlineations here in red ink were made here in San Francisco, were they not? A. Yes.

Q. And the 5,749 tons, 560 lbs., below the type-written matter in the bill, indicates the out-turn weight, that is, the custom-house weight in San Francisco upon which the Western Fuel Company paid the United States its customs duties; that is correct? A. Yes, sir.

Q. And the price was likewise changed in red ink at the San [418—363] Francisco office?

A. To show what we paid Nanaimo for the coal.

Q. And the language “Charge coal account, S. F.” and “O. K. G. M. M.” was likewise written in San Francisco. A. By the bookkeeper.

Q. And at the time the bill was received by you all of the typewriting now appearing on the face of the bill was on the bill, including the statement at the bottom, “Actual weight of this coal, 5822 tons.”

(Testimony of D. C. Norcross.)

A. Yes, sir.

Mr. McCUTCHEN.—Mr. Roche, I don't know whether you have developed it, I was looking at this exhibit at the time, but I suppose you realize that in that case the custom-house weights were 102 tons, 560 lbs. in excess of the bill of lading weights.

Mr. ROCHE.—Yes, and that is just the reason why I directed this to the witness' attention, because I wanted to show that as a matter of fact there were only 102 tons in excess placed upon the boat at the time the boat left Nanaimo; in other words, to show that there was no overage, that there was a shortage, although in determining the percentages you were given the benefit of an overage.

* * * * *

I would like to have the jury see, in connection with the exhibit, the bill of lading and the invoice; this is the invoice, sworn to before the American Consul. This is the bill of lading.

Q. Let me ask you this question, Mr. Norcross, while the jurors are looking at that exhibit. If the actual weight of coal laden into that vessel was as it is specified in this bill, 5822 tons, instead of 5647 tons, being the tonnage expressed in that bill of lading and in that invoice sworn to before the American [419—364] Consular official, instead of there being an overage of 102 tons there would be a shortage of about 75 tons, would there not?

A. Naturally.

Q. Well, 73 tons to be exact; is not that correct?

A. Yes, there would be a shortage.

(Testimony of D. C. Norcross.)

Q. There would be a shortage of 73 tons, even though there had been discharged from the vessel at this port the 102 tons in excess of the bill of lading or invoice weight.

A. There would be a shortage between whatever the actual amount of the cargo might have been and whatever was put out.

Mr. McCUTCHEN.—Mr. Roche, in that connection, and for our own information and enlightenment, will you tell us whether you claim the bill of lading weights were correct or incorrect?

Mr. ROCHE.—In this particular instance we claim they were incorrect, because we claim that they put more coal upon the boat than the bill of lading shows.

Mr. McCUTCHEN.—And do you claim that in every other case, where that was not the case, that the bill of lading weights were actually correct?

Mr. ROCHE.—So that there will not be any question about our position, we claim there was at least as much coal placed on the boat as indicated by the bill of lading and the invoice, and in a great many cases there was more coal put on the boat than shown by the invoice or bill of lading, and that statements of overages in a great many instances are not correct, and are in fact shortages.

Mr. McCUTCHEN.—In other words, you claim that the bills of lading invariably show the minimum weight.

Mr. ROCHE.—They at least show the minimum weight. Your own bills show that. [420—365]

(Testimony of D. C. Norcross.)

Mr. McCUTCHEN.—And that the coal on the vessels always weighed at least as much as was indicated by the bill of lading.

Mr. ROCHE.—Yes. It might be well for the jurors to use this bill in connection with the bill of lading and the invoice.

The COURT.—I understood the testimony to be that the figures shown in the invoice and bill of lading are the first figures there in black ink and later scratched out.

Mr. ROCHE.—Yes, your Honor, that is correct—in typewriting.

* * * * *

Q. I call your attention to a bill for the next month, or covering the next month, being a bill dated October 3, 1908, Nanaimo, B. C.; Western Fuel Company, San Francisco, California; Bought of Western Fuel Company. In black typewriting appears the following: “5696 tons, New Wellington Coal, 3.75, \$21,360, per S. S. “Titania.” The 5696 tons is stricken out and in red ink is inserted 5725 tons, 890 lbs.; that is correct, is it not? A. Yes.

Q. The price is stricken out and in red ink is inserted “\$21,470.24, charge coal account, S. F. O. K. G. M. M.” At the bottom of the bill is likewise in black type, “Actual weight of this cargo 5872 tons.” That is correct, is it not? A. Yes, sir.

Q. Showing an overage of about 180 tons, a little less than 180 tons. A. Yes, about that.

Q. There was discharged, according to the figures in red ink which indicates the out-turn or customs

(Testimony of D. C. Norcross.)

weight, 5725 tons, 890 lbs., or about 121 tons more than apparently was in the boat, according to the sworn invoice and the bill of lading; that is correct, is it not? A. 25 tons. [421—366]

Q. About 29 tons, is it not? A. 29 tons, yes.

Q. That is correct, is it not? A. Yes, sir.

Q. As a matter of fact, if the figures at the bottom of the bill indicating the actual weight were in fact the weight of the cargo of coal, instead of there being an overage there would be quite a shortage, would there not? A. Yes.

* * * * * * *

[Testimony of W. H. Tidwell, for the Government.]

W. H. TIDWELL, on the resumption of his direct examination as a witness, called by the United States testified as follows:

Direct Examination Continued by Mr. ROCHE.

Since I was last on the witness-stand, I have made a careful examination of photographic copies of the books or diaries kept by the defendant Mills relating to an apparent overage of some 70 per cent connected with the barge "Comanche" in October, 1911. A memorandum has been prepared under my supervision covering the entries in the Mills diaries relating to the discharge of this barge at the time above specified.

Q. Just explain the situation from the memorandum which you hold in your hand.

A. It appears that on Friday, October 13, 1911, the barge "Comanche" received 814 tons, 310 lbs., and discharged into the transport "Thomas" 196

(Testimony of W. H. Tidwell.)

tons, 240 lbs., leaving a balance of 618 tons and 70 lbs. in the barge. On October 16th the barge continued to discharge into the steamer "Aorangi," discharging 305 tons, 1750 lbs., making a total amount discharged from the barge of 501 tons, 1990 lbs., and leaving a balance of 312 tons, 560 lbs. in the barge. On [422—367] the 17th, the barge received an additional amount, additional tons, making the total amount received in the barge of 856 tons, 1660 lbs., and continued to discharge into the "Aorangi," making a total discharge from the barge of 580 tons, 210 lbs., leaving a balance of 276 tons, 1450 lbs. On Saturday, the 28th and 29th, the barge had received additional tonnage, amounting to 1433 tons, 1970 lbs., and had discharged a total up to that date of 879 tons, 679 lbs., leaving a balance in the barge of 536 tons, 1290 lbs. On October 30, the discharge was continued—nothing was discharged and nothing received. On the 31st nothing was received; the total discharge amounted to 1199 tons, 1869 lbs., leaving a balance of 234 tons, 101 lbs. in the barge. On November 2d, nothing additional having been received, the discharge continued, with a total of 1394 tons and 93 lbs., leaving a balance of 39 tons, 1887 lbs. in the barge. On the 3d she again received coal, making a total amount received of 2059 tons, 2030 lbs.; and discharged a total of 1585 tons, 1339 lbs., leaving a balance of 474 tons, 691 lbs. On the 4th the discharge was continued, making a total amount discharged of 1757 tons, 1451 lbs., the balance being

(Testimony of W. H. Tidwell.)

302 tons, 579 lbs. in the barge.

* * * * *

On the 8th the totals were dropped, and the balance of 302 tons, 579 lbs. carried forward as having been received from the steamer "Thor." On the same date 100 tons, 565 lbs. were laden into the vessel "Lukenbach," leaving a balance of 202 tons and 14 lbs. On the 18th she received an additional amount, making the total in the barge at that particular time—not at that particular time, either, but the total in the barge having been received since the 8th, of 635 tons, 1649 lbs., and discharged into the "Kansas City" 41 tons, making a total [423—368] discharge of 141 tons, 565 lbs., or a balance of 494 tons, 1084 lbs., in the barge at the close of business on that particular day. On the 20th she had not received any additional tonnage, but had discharged a total of 393 tons, 1772 lbs., leaving a balance of 242 tons 2117 lbs. On the 21st no additional tonnage had been received, but the discharge was continued, making a total discharge of 446 tons, 17 lbs., or a balance of 189 tons, 1632 lbs., in the barge. On December 1st she had received 725 tons, 1649 lbs., and discharged 745 tons, 17 lbs. On December 2d—

Mr. McCUTCHEN.—(Intg.) When you say, on December 1st she had received, you gave a quantity of coal on the barge as something like 100 and odd tons, did you not? When did she get the additional coal to make 725 tons, 1649 lbs.?

A. The balance was 302 tons, 579 lbs.

(Testimony of W. H. Tidwell.)

Q. I am not talking about that; I am talking about the coal received.

A. Well, she received from the offshore bunkers on the 18th, 96 tons, 1700 lbs.; from the offshore bunkers on the same date, 24 tons, 390 lbs.; from the "James B. Smith" 212 tons, 1160 lbs., making a total of 635 tons, 1649 lbs.

Q. Does that total include the 302 or is it exclusive of it? A. It includes it. * * *

And on December 1st she received 90 tons more from the offshore bunkers, making a total received of 725 tons, 1649 lbs., with a total discharge up to that date of 745 tons and 17 lbs. The discharge was continued on the 2d with a total of 1071 tons and 37 lbs.; up to and including December 4th, the date on which the cleanup was made, it appeared that she had received 725 tons, 1649 lbs., and discharged 1244 tons, 1767 lbs., or 519 tons and 118 lbs. more than had been received, but [424—369] that 519 tons and 118 lbs. represents the overage on the total amount received in the barge of 2483 tons and 860 lbs.

Q. Or what percentage?

A. About 21 per cent.

Mr. McCUTCHEN.—There is some little difference between that and 70 per cent, isn't there?

Mr. ROCHE.—That is correct.

I have compiled a table showing the total quantity of coal laden upon these various barges owned or controlled by the Western Fuel Company between January 1st, 1904, and December 31st, 1905, and a

(Testimony of W. H. Tidwell.)

table showing the discharge of that coal from the barges into particular boats, showing also the weight of the coal at the point of discharge and the overage where an overage existed between the weight taken at the time the coal was checked into the barge and the supposed weight of the coal at the point of delivery.

Q. Now, this table to which you have just referred shows all coal laden upon the barges and discharged from the barges between the first of January, 1904, and the 31st of December, 1905, and when I say "coal" I am referring, of course, to foreign coal; that is correct, is it not?

A. Yes, sir, according to the books of the defendant Mills.

Q. That is compiled from the books kept by the defendant Mills, is it? A. Yes, sir.

Q. And which books are already in evidence.

A. Yes, sir.

Q. I would like to have you state the quantity of coal which was discharged into the barges according to weight upon which the coal was checked into the barges. Let me have the [425—370] weight for 1904?

A. For 1904 the total debits or amount laden on the barge, amount to 99,944 tons, 2210 lbs.

Q. What was the weight of that same coal at the point of discharge; that is, when it was discharged from the barges during the year 1904?

A. 104,205 tons, 409 lbs.

Q. Upon what portion of that coal were drawback

(Testimony of W. H. Tidwell.)

duties paid by the United States Government?

A. That I can not answer; I don't know the total amount. I know they differed.

Q. For the year 1904. Your table shows that, does it not, Mr. Tidwell?

A. No, it does not show that, Mr. Roche—yes, it does; it does not show the total amount of drawback paid there, it shows the difference.

Q. Does it not show the amount upon which drawbacks were paid as well as the amount upon which drawbacks were not paid?

A. It shows the difference.

* * * * *

Q This statement, Mr. Tidwell, was compiled by you the same as was compiled Table "C" in U. S. Exhibit 125? A. Yes, sir.

Q. And the various pages of this exhibit, excepting these pages upon which are set forth the summaries of figures already contained, disclose the name of the barge upon which the coal was checked and laden; that is correct, is it not?

A. Yes, sir. [426—371]

Q. And the source from which the coal was obtained? A. That is true.

Q. And the particular boat or vessel into which the coal was subsequently discharged?

A. That is true.

Q. Where there was a drawback, the registered number of the drawback, and the quantity of coal for which the drawback was made; is that correct?

A. Yes, sir, that is true.

(Testimony of W. H. Tidwell.)

Q. Or, rather, for which the claim was made?

A. That is true.

Mr. McCUTCHEN.—Now, upon that explanation, we have not any objection to that paper going in for what it is worth.

Mr. ROCHE.—All right.

Q. Now, I would like to have you testify, Mr. Tidwell, what the excess weight of the coal was discharged from these barges, as compared with the weight of coal checked into the barges during the year 1904?

A. For the year 1904, that is not tabulated—yes, I can get that here by adding the two figures.

Q. I will withdraw that question and direct your attention to both years, because you have taken both years together, have you not?

A. Yes, sir, the whole thing has been treated as one, it is just in one statement.

Q. You have testified that in 1904 there was checked into the barges 99,944 tons, 2210 pounds of coal; during 1905, what quantity of coal was checked into these barges?

A. In 1905 there were checked in 107,364 tons, 982 pounds.

Q. Making the total for both years, 1904 and 1905, of how much? A. 207,309 tons, 952 pounds.

Q. That was the quantity of coal checked into the barges?

A. Into the barges, yes, sir. [427—372]

Q. You have already testified that during the year 1904 there was discharged from these same barges

(Testimony of W. H. Tidwell.)

apparently 104,205 tons, 419 pounds of coal; that is correct, it is not? A. Yes, sir.

Q. What tonnage of coal was discharged from the same barges during the year 1905?

A. 113,149 tons, 1680 pounds.

Q. Making a total of what quantity of coal discharged from the barges for the two years, 1904 and 1905? A. 217,354 tons, 2099 pounds.

Q. What was the excess quantity of coal discharged from those barges during those two years, that is, the quantity of coal in tons and pounds in excess of the quantity of coal which, according to the books of the defendant Mills, was checked into the barges? A. 10,045 tons, 1147 pounds.

Mr. ROCHE.—Q. Part of the table which you have prepared here, Mr. Tidwell, shows or undertakes to show, upon what quantity, or upon what quantity of that excess, drawback claims were presented and what quantity of that excess went into boats upon which no drawback claims were made; how did you arrive at those figures?

A. Where there were two or more vessels by prorating the amount of overage between the particular vessels.

Q. That is, in proportion to the quantity of coal which the vessel took; is that correct? A. Yes, sir.

Q. And you assumed, of course, proportionately, that there was as much of the excess went into one boat as into the other? A. Yes.

Q. In view of the explanation which you have just made, Mr. Tidwell, what was the result of the calcu-

(Testimony of W. H. Tidwell.)

lation which you have just made with reference to that part of this excess as to which drawback [428—373] claims were presented and that part as to which no drawback claims were presented?

A. On which drawback was paid, it amounted to 6927 tons, 1812 pounds; and on which drawback was not paid,—there are two items here, on a transport, 332 tons, 2027 pounds, and on other vessels 2784 tons, 1788 pounds.

Q. If you will examine the preceding page, Mr. Tidwell, you will see that those figures are specified upon that page standing alone.

A. Yes, I remember that now. Without drawback, 3117 tons, 1575 pounds. With drawback, 6927 tons, 1812 pounds.

Q. Did you make an examination of the books of the defendant Mills for the purpose of determining from those records what proportion of the coal discharged from these barges was laden upon the boats of the Pacific Mail Steamship Company, and what quantity was laden upon boats of the Oceanic Steamship Company, and what quantity was laden upon boats of the American-Hawaiian Steamship Company, and also upon boats belonging to other companies, as well as upon United States transports and other Government vessels? A. Yes, sir.

Mr. McCUTCHEN.—That is all set forth in the exhibit, is it not?

Mr. ROCHE.—Yes. Q. Just state, from the record which you have before you, Mr. Tidwell, which is the table to which your attention has been called,

(Testimony of W. H. Tidwell.)

what proportion of this coal was deposited into those various boats?

A. Pacific Mail Steamship Company, 5424 tons, 265 pounds.

Q. These figures relate, do they not, exclusively, to excess tonnage? A. To excess tonnage alone.

Mr. McCUTCHEN.—And they are arrived at in the way the [429—374] witness has heretofore explained?

Mr. ROCHE.—Yes, that is correct; that is, they are arrived at in the same manner as has been explained by the witness, unless the total quantity of coal checked in or laden upon the barge was subsequently discharged into one or more vessels of the Pacific Mail Steamship Company. That is correct.

A. (Continuing.) Oceanic Steamship Company, 1263 tons, 314 pounds. This is all with drawback. American-Hawaiian Steamship Company, 240 tons, 829 pounds.

Q. It is a fact, is it not, that the boats of these various companies, whose names you have just given us, are American registered vessels, and when coal for fuel purposes is discharged into those boats they are entitled to claim drawback duties?

A. Yes, sir.

Q. What quantity of excess coal was, according to this calculation of yours, discharged into United States transports? A. 332 tons, 2027 pounds.

Q. By the way, will you also give to us the total quantity of coal, that is, the total quantity of this excess tonnage which, according to your calculation, was discharged into all of the boats of the Pacific

(Testimony of W. H. Tidwell.)

Mail Steamship Company, the Oceanic Steamship Company, and the American-Hawaiian Steamship Company?

Mr. McCUTCHEN.—Is not that in the total he has already given?

Mr. ROCHE.—Yes.

A. Yes, 6,927 tons, 1812 pounds.

Q. What proportion of that excess tonnage was discharged into vessels without the benefit of drawbacks, that is, vessels other than those belonging to the companies to which you have already testified, and other than United States transports, and United [430—375] States vessels?

A. 3117 tons, 1575 pounds.

Q. That relates to excess tonnage for both years?

A. Yes, sir.

Q. Have you the figures before you showing the amount paid by the United States Government upon that portion of the excess tonnage upon which drawback claims were made?

Mr. McCUTCHEN.—That is to say, upon which he assumes drawback claims were made.

Mr. ROCHE.—That is to say, assuming the witness' calculation is correct.

A. Yes, sir.

Q. And you have them divided so as to show the price under the tariff act of 1897 and the tariff act of—

A. (Intg.) It is all under the tariff act of 1897.

Q. Oh, yes, that is correct. What is the amount?

A. \$4,641.63.

(Testimony of W. H. Tidwell.)

Q. You have made a calculation, have you not, as to the value of the excess tonnage which, according to your calculation was laden upon the United States army transports, at \$7 a ton?

A. Yes, I have, amounting to \$2331.

Mr. McCUTCHEN.—And that brings down the total amount due the Government as how much?

Mr. ROCHE.—The total amount due the Government alone upon the excess tonnage, \$6972.63.

Mr. McCUTCHEN.—You say “alone” upon the excess tonnage—what do you mean?

Mr. ROCHE.—I say due to the Government alone.

Q. You have not as yet made any calculation, so far as this table is concerned, showing the value of excess tonnage claimed to have been discharged into the boats of the Pacific Mail Steamship Company and these other boats, have you? [431—376]

A. No, I have not, except as to the question of drawbacks.

Mr. ROCHE.—At this time, may it please the Court, I offer this additional table “C” in evidence.

(The document is here marked “U. S. Exhibit No. 130.”)

Q. I want to call the witness’ attention to some of the figures where were testified to before court adjourned some days ago, for the purpose of asking him about a calculation. Mr. Tidwell, you will recall testifying that according to the total coal sold from the first of April, 1906, to and including the 31st day of December, 1912, taking into consideration the coal on hand on that day, there was sold 61,966

(Testimony of W. H. Tidwell.)

tons, 1374 pounds of coal in excess of the coal received during the same period, including coal on hand on the first day of April, 1906; you recall that testimony, do you not? A. I do.

Q. That, of course, includes some 300 tons of coal burned, as you will remember, during the month of October, 1908? A. 356 tons, I think it was.

Q. You will also recall testifying from figures set forth in Table "C" of United States Exhibit No. 125, that there were 33,223 tons, 542 pounds more coal weighed out of the barges than was apparently checked in; you remember that, do you?

A. Yes, I do.

Q. And that is correct, is it not?

A. That is correct. [432—377]

Q. So that, assuming the first calculation to be correct, and that is that the total excess of coal sold above the coal received and on hand, amounting to 61,966 tons, 1374 pounds, and the excess coal discharged from the barges, amounting to 33,223 tons, 542 pounds, the excess coal sold during that same period of time, other than the coal from the barges, would amount to 28,743 tons, 832 pounds; will you just make that calculation, please, so that you can testify to it in the record?

A. Yes, sir; 28,743 tons, 832 pounds.

Q. That represents the excess tonnage that is not accounted for by the discharge of coal from barges; is not that correct? A. Yes.

Q. Did you ascertain from the books and records of the Western Fuel Company that during this

(Testimony of W. H. Tidwell.)

period of time coal was delivered from time to time to some of the United States army posts in and about the bay? A. Yes, sir.

Q. From your examination of the records kept by the defendant, Mills, no part of the coal that was checked on to these barges was subsequently discharged at any of these posts, was it?

A. I don't recall any.

Q. Assuming that your calculation is correct, that is, the calculation shown by your Exhibit "B," in which the coal sold above the coal received is set forth, I would like to have you multiply the 61,966 tons plus by the value of coal as testified to by Mr. Norcross—about \$6.50.

A. I will take the round numbers, 61,966 tons, will I?

Q. Yes. A. \$402,779.

* * * * * * *

Q. Now, turning to the table which you have in your hand, being table C of United States Exhibit No. 125, what quantity of such [433—378] excess, according to your calculation—I will withdraw that question and put it in this way: Are the calculations which are set forth in Table C of United States Exhibit No. 125 made upon the same method as pursued by you in making the calculations set forth in the supplementary Exhibit "C," to which your attention has heretofore been attracted?

A. Exactly the same, yes, sir.

Q. That is, in those instances where the coal checked upon the barge was subsequently discharged

(Testimony of W. H. Tidwell.)

into one or two boats with benefit of drawback, of course, you would know exactly upon what quantity of coal the drawback claim was based? A. Yes.

Q. And when part of it was discharged into boats having the benefit of drawback and into other boats without that benefit, you would pro-rate that upon the quantity of coal laden upon the respective vessels?

A. Yes, sir; that is, we would pro-rate the excess.

Q. Upon what part or portion of the 33,223 tons 542 pounds excess coal discharged from these barges according to your calculations were drawback claims made and paid by the United States Government?

* * * * *

A. Under the tariff act of 1897, 12,533 tons, 1135 pounds; under the tariff act of 1909, 9902 tons, 1334 pounds; a total of 22,436 tons, 229 pounds.

Mr. ROCHE.—Q. What portion of the excess, according to your calculations, was discharged into United States transports?

A. 1196 tons, 1109 pounds.

Q. And into United States revenue cutters?

A. 57 tons, 1736 pounds. [434—379]

Q. What portion of that excess of tonnage was discharged into boats without benefit of drawbacks, other than United States transports and United States Government boats:

A. 9,532 tons, 1948 pounds.

Q. Did you make a calculation for the purpose of determining the amount in money that was paid back by the Government upon these drawback claims under the tariff act of 1897 and the tariff act of 1909?

(Testimony of W. H. Tidwell.)

A. Under the tariff act of 1897 they paid \$8397.45; under the tariff act of 1909, it returned \$4,456.16.

Q. What was the total amount thus paid back upon that excess tonnage representing drawbacks?

A. I have to have that.

Q. Well, I have it here; you can verify it. It is \$12,853. 61. That may be inaccurate, because it is my own calculation. A. That is correct.

Q. Did you make a calculation, or was any calculation made by you representing the value of the excess tonnage, assuming your calculations to be correct, laden upon the United States transports and the United States revenue cutters?

A. Yes, sir; on United States transports, 1196 tons, 1109 pounds, estimated at \$7 per ton, \$8,375.50; on revenue cutters, 57 tons, 1736 pounds, estimated at \$7 per ton, \$404.25.

Q. Making a total of what? I will give you the addition; \$8779.75, is that correct? A. Yes, sir.

Q. I would like to have you add the figures to which you have just testified, representing the value of excess coal laden upon the United States transports and revenue cutters and the quantity of drawbacks paid by the United States Government upon that portion of the excess tonnage to which you have just testified.
[435—380]

Mr. McCUTCHEN.—You might as well read the figures, Mr. Roche.

Mr. ROCHE.—I will state the figures, and if there is any inaccuracy in them they can be corrected hereafter. \$21,633.36.

(Testimony of W. H. Tidwell.)

Q. Does the table which you hold in your hand show what portion of this excess tonnage was laden upon boats belonging to the Pacific Mail Steamship Company, what portion upon boats belonging to the Pacific Coast Steamship Company, what portion upon boats belonging to the Oceanic Steamship Company, and what portion upon boats belonging to the American-Hawaiian Steamship Company?

A. Yes, sir. There are two items for the Pacific Mail Steamship Company, on account of the different rates of the drawbacks. The Pacific Mail Steamship Company, 11,129 tons, 1825 pounds, at 67 cents a ton.

Q. That is under the tariff act of 1897?

A. The tariff act of 1897, yes; \$7456.98. Under the tariff act of 1909, 9,888 tons, 2187 pounds, at 45 cents, \$4,450.04. The Oceanic Steamship Company, all under the tariff act of 1897, 1,270 tons, 2166 pounds, at 65 cents, \$851.35. The American-Hawaiian Steamship Company, under the tariff act of 1897, 132 tons, 1624 pounds, at 67 cents, \$88.92. Pacific Coast Steamship Company, 13 tons, 1387 pounds, under the tariff act of 1909, at 45 cents, \$6.12.

Q. Do you know, or can you now ascertain what the total quantity of this excess is which was, according to your calculations or figures, deposited in these various steamers and these other steamers, the names of which you have not given us?

A. I don't understand the question. [436—381]

Q. Let me put it this way: You testified a few moments ago that the sum of 9,532 tons, 1948 pounds

(Testimony of W. H. Tidwell.)

represented that portion of this excess quantity of coal which was laden into vessels other than vessels with the benefit of drawbacks; do you recall that?

A. You mean in this statement here?

Q. Yes. A. Yes, that is correct.

Q. I would like to have that portion of the excess tonnage added—

A. (Intg.) 9532 tons, 1948 pounds.

Mr. ROCHE.—Mr. McCutchen is willing to permit me to state the additions, and if they are incorrect they can be corrected hereafter. Q. Taking into consideration the 9,532 tons, 1948 pounds of coal discharged into vessels without the benefit of drawback and the coal discharged into the vessels of the Pacific Mail Steamship Company, the Oceanic Steamship Company, the American-Hawaiian Steamship Company and the Pacific Coast Steamship Company, to which the witness has just testified, the total excess tonnage represented by those vessels would amount to 31,968 tons, 2177 pounds. I would like to have you multiply, Mr. Tidwell, those figures, 31968 tons plus, representing the excess tonnage to which I have just referred, by \$7.

* * * * * * *

A. \$223,776.

I visited Nanaimo in 1913, and spent about two days there, I believe. I examined the properties of the Western Fuel Company there exclusive of the mines. I visited the scales-house. My visits to these properties were two in number. On my first visit I went to where the cars start off to the bunkers on a

(Testimony of W. H. Tidwell.)

trestle. I went out to the bunkers and located the place where [437—382] the ships come to the bunkers for the purpose of receiving coal. I noted the general condition of the bunkers at that time; also I noted there the blacksmith house and some houses back some distance from the chutes where the vessels receive coal. Later I made a trip down as far as the hoist, the office of the Western Fuel Company, and observed the properties there, including the tracks and the scales. I found that there were two kinds of cars, large and small, and my remembrance is that there were two scales on the tracks, one on either side. My recollection is that there were two scales, one on the right-hand side of the tracks, and one on the left-hand side of the tracks. No coal was being discharged while I was at Nanaimo, because there was a strike on at the mines, and there had been for some week or ten days. I should say the scales-house was located about a quarter of a mile from the bunkers and docks.

I have testified to the excess tonnage discharged from the barges in the years 1904 and 1905, the figures having been ascertained by me from the books kept by the defendant Mills, which were practically the only records furnished to me covering those two years. I have been informed that the other records were destroyed in the conflagration of 1906. In view of this destruction of records it was impossible for me to determine what the entire sales of foreign coal by the Western Fuel Company for the years 1904—1905 in excess of the quantity of foreign coal received during those years were. I have testified to the en-

(Testimony of W. H. Tidwell.)

tire sales of coal from April 1st, 1906, to December 31, 1912, in excess of coal received, considering, of course, coal on hand. Now, adding the excess tonnage discharged from the barges for the period 1904—1905 to said above mentioned total excess sales for the period from April 1st, 1906, to December 31, 1912, the aggregate [438—383] excess tonnage would be 72,011 tons and some odd pounds. Assuming that that coal could be sold for approximately \$7 a ton, its value would be \$504,077, representing the value, therefore, of the excess tonnage for the period from January 1, 1904, to December 31, 1912, not taking into consideration, of course, any excess tonnage existing during the years 1904 and 1905, except the excess tonnage discharged from the barges.

I recall making an examination of the monthly sheets which have been introduced in evidence showing the receipt and sale of coal. In a number of instances said sheets show a certain amount of coal was taken up as overrun ex-barges, and overrun ex-stock. In other instances mention is simply made of an overrun, without specifying how it occurred. On the sale sheet there were several from Oakland that allowed overrun of coal which were taken up as other coal. The fact, however, that there was an overrun is shown upon the face of the statement.

The “Germanicus,” as I recall from my investigations, was discharged in the latter part of 1905.

Mr. ROCHE.—We at this time offer in evidence the invoice relating to the cargo carried by the steamship “Germanicus” in August, 1905.

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—No objection.

Mr. ROCHE.—I do this preliminarily. We will offer further proof as to it before the Government closes its case. I only desire to direct the jury's attention to part of this invoice. The invoice is numbered 9906. The bill of lading is dated August 10, 1905, issued by the Wellington Colliery Company, Limited, Wellington Coal, Ladysmith, British Columbia. Shipped in good order by Wellington Colliery Company, Limited on board the S. S. "Germanicus," whereof W. Berndt is Master and [439—384] bound for San Francisco, 5970 tons, Wellington lump coal, the dangers of fire and navigation excepted, consigned to Western Fuel Company, San Francisco. The consumption entry is as follows: "Consumption Entry. Entry of merchandise imported by Western Fuel Company in the German steamer 'Germanicus' whereof Berndt is Master, from Ladysmith, on the 15th day of August, 1905." It shows that the invoice weight was 5950 tons of coal, value \$23,800. The 5970 is stricken out, in red ink and immediately underneath in red ink are placed the figures 5603. Those figures are again stricken out in red ink and immediately underneath that is replaced in red ink 5950 tons, representing the invoice weight. Now, immediately under the figures and language 5950 tons coal, \$23,800, being the invoice tonnage and the value of the coal at invoice tonnage, is the following entry in red ink: "Reliq. to correct error in weights."

Q. That means "reliquidation," does it not, Mr.

(Testimony of W. H. Tidwell.)

Tidwell? A. Reliquidation, yes.

Mr. ROCHE.—Then in red ink below the interlineation to which I have already referred are the following insertions: “23,800”; that refers to the value of the cargo; “67 cents, \$3986.50”; indicating the duty. Near the bottom at the right-hand corner of this entry is the following insertion: “Deposit \$3986.70, refund, \$232.49, \$3754.01.” Reliq., referring to reliquidation, \$3754.01, and that is stricken out and above that is inserted \$3986.70. “Due U. S. \$232.49; duty paid August 15, 1905.”

* * * * *

Mr. ROCHE.—The invoice itself reads as follows: “Invoice, August 10, 1905; invoice of coal consigned to Western Fuel [440—385] Company at San Francisco for sale account of blank, shipped by Wellington Colliery Company, Limited, per steamship “Germanicus” Number and remarks, 5970; description, coal; Consular certificate; bituminous; 415 is written in red ink; value \$4.00; amount \$23,800; the certificate costing \$2.50, makes a total of \$23,802.50; 67 cents, referring to the duty, per ton; August 21, 1905, merchandise as noted, amount \$23,800, E. J. E., John Dare, Appraiser.”

The certificate of delivery of imported merchandise is part of the invoice and may likewise be considered as having been read into the record?

Mr. STANLEY MOORE.—Certainly.

* * * * *

Mr. ROCHE.—Will you admit, so as to avoid the necessity of explaining the invoice and consumption

(Testimony of W. H. Tidwell.)

entry which we have already offered in evidence, that it discloses upon its face that there was a shortage, an apparent shortage of 347 tons, 110 lbs.?

Mr. STANLEY MOORE.—Whatever is the fact.

Mr. ROCHE.—It is the fact, and that was reliquidated and upon reliquidation the invoice weight was ascertained and the duty paid upon the invoice weight.

Mr. STANLEY MOORE.—We will admit that there was a very large shortage in the case of that vessel, in the neighborhood of 400 tons, and that the duty was paid, and the matter was adjusted upon the invoice weight.

Mr. ROCHE.—In other words, notwithstanding the shortage of approximately 400 tons, which you have just indicated, the weights were liquidated and the customs duties paid upon the invoice weights. Is that right? [441—386]

Mr. STANLEY MOORE.—Yes.

Mr. ROCHE.—Will you mark that, Mr. Clerk; it will be “131.”

(The document was marked “U. S. Exhibit No. 131.”)

* * * * *

Mr. ROCHE.—We also desire to offer in evidence, may it please the Court, the invoice, bill of lading and consumption entry relating to the steamship “Dumbarton,” likewise conveying a cargo from Ladysmith; she arrived here on the 29th of August, 1905; that is during the same month during which the “Germanicus” arrived and was discharged. I

(Testimony of W. H. Tidwell.)

suppose this may be considered as having been read.

Mr. STANLEY MOORE.—The same may be considered as having been read.

Mr. ROCHE.—Now, may it please the Court, without reading this in detail to the jury, I suppose you will concede that when this coal was weighed there was an apparent shortage of a little over 400 tons; I believe about 409 tons.

Mr. STANLEY MOORE.—My recollection is that it was about that, and the same stipulation will be made affecting that matter too, if your Honor please, that the duties were paid upon the invoice weights instead of the custom-house or out-turn weights.

* * * * *

Mr. ROCHE.—It is admitted that notwithstanding the fact that there was a shortage of approximately 409 tons below the invoice or bill of lading weight, that the Western Fuel Company paid to the United States Government duties upon the invoice weight.

Mr. STANLEY MOORE.—Yes, we will admit that again.

Mr. ROCHE.—Conceding the invoice weight to be correct? [442—387]

Mr. STANLEY MOORE.—Yes, or it was the best that could be done.

Mr. McCUTCHEN.—There is no concession about it.

Mr. ROCHE.—The duty was paid upon the assumption then that the invoice weight was correct and the discharge weight was incorrect. I will ask that this be marked U. S. Exhibit 132.

(Testimony of W. H. Tidwell.)

(The document was marked "U. S. Exhibit No. 132.")

I desire, may it please the Court, the invoice relating to the cargo shipped on the steamship "Carlton" during the month of September, 1903; she discharged here in March, 1904. And I suppose this may be considered as read. This is only important in connection with some evidence that may hereafter be offered.

Mr. STANLEY MOORE.—Yes, your Honor, it may be deemed to have been read.

Mr. ROCHE.—And you will concede, will you, that there was an apparent shortage of about 66 tons in this particular case?

Mr. STANLEY MOORE.—Well, whatever the fact may be. What was the total of the cargo?

Mr. ROCHE.—The shortage in this case was approximately a little over 66 tons. The invoice shows that the bill of lading weight was 2680 tons. The invoice likewise shows that the out-turn weight as indicated upon the Consumption Entry was 2613 $\frac{3}{4}$ tons. Only a part of this cargo was discharged at San Francisco by the Western Fuel Company.

* * * * *

(The document was here marked "U. S. Exhibit No. 133.")

Cross-examination by Mr. McCUTCHEN.

I began my investigation in the latter part of August [443—388] or the first of September, 1912. I think the first indictment found against the defendants in this case was in March, 1913. So far as I

(Testimony of W. H. Tidwell.)

know the defendants had no knowledge of the fact that they were being investigated, or that the business of the Western Fuel Company was being investigated by the Government from the first of September, 1912, until the finding of these indictments.

According to my Table A, the Western Fuel Company discharged coal from the following vessels during the month of September, 1912: the "Ikalis"; the "Thor"; the "Heckla"; the "Kokohead"; the "Titania"; the "Wellington," and the "Lord Curzon." My Table A does not show the places of discharge. The records of the custom-house show the docks at which the ships were discharged, but I did not examine the records with that item in mind, though I could have ascertained it if I wished to when I was going over the records. The invoice weight of the "Ikalis" on the voyage above referred to was 6430 tons; the ascertained weight 6197 tons, 130 pounds. The invoice weight of the "Thor," 7293 tons; the ascertained weight, 7094 tons, 1300 pounds. The invoice weight of the "Heckla," 2127 tons; the custom-house weight, 2077 tons, 520 pounds. The invoice weight of the "Kokohead," 1931 tons, and the custom-house weight 1902 tons, 610 pounds. The invoice weight of the "Titania" was 4029 or 4829 tons; the custom-house weight, 4771 tons, 2040 pounds. The invoice weight of the "Wellington," 2304 tons; the custom-house weight, 2317 tons, 1240 pounds. The invoice weight of the "Lord Curzon," 4897 tons; the custom-house weight, 4894 tons, 1500 pounds. That was all of the full cargoes during the month of September.

(Testimony of W. H. Tidwell.)

From my investigation of the custom-house records, the places in California where cargoes were discharged by the Western [444—389] Fuel Company were, as I recall, San Francisco, Oakland, Eureka, Santa Barbara, Los Angeles and San Diego. My exhibit "A" in some instances, but not in others, purports to show where the discharge was made. If a cargo was discharged at San Diego, the word "S. D." so indicates. For Los Angeles and Santa Barbara, I think the entries would be made at Los Angeles. Five cargoes seem to have been discharged in the month of October, 1912. In three instance, according to Table A there was a shortage, and in two instances an overage. In November four cargoes were discharged. I do not find any initials to indicate that there were discharges at other places than San Francisco. Some of them may have been discharged at Oakland, or, at any rate, parts of their cargoes may have been there discharged. They would not necessarily have been discharged under the same weigher at Oakland as at San Francisco, for the reason that weighers, I know by actual experience, are sometimes changed from day to day. In November there are three cases of shortages. Four cargoes were discharged in December, 1912. In two cases I find a shortage, according to Table A, and in two cases an overage. The month of January is not included in Exhibit "A." I did not examine the custom-house records for that month, my statement running from April, 1906, to December 31, 1912.

Q. Why did you not make an investigation for that month?

(Testimony of W. H. Tidwell.)

A. I preferred to check with the records of the Western Fuel Company, against them as well as the custom-house records. I wanted to be perfectly fair to the Western Fuel Company as well as to the Government.

Q. You always have had a desire to be fair to the Western Fuel Company, I suppose?

A. I have. [445—390]

Q. Do you know whether in the course of the preparation of their defense the defendants desired to examine some records of the custom-house?

A. I do.

Q. Did you object to their examination of those records? A. I did.

Q. Was that with the notion of being fair to the defendants? A. It was.

Q. That was your idea of fairness to the defendants, was it?

A. Because the defendants would not permit us to see their records.

Q. That was the reason that you objected to these defendants having access to the public records in the custom-house, was it? A. Yes, sir.

Q. And that was the only reason? A. Yes, sir.

Q. Had you access to the records of the Western Fuel Company before that time?

A. Some of them.

Q. When did you prepare Exhibit "A"?

A. As soon after the company was required to produce the books before the Grand Jury as I could; I commenced say in February, 1913.

(Testimony of W. H. Tidwell.)

Q. You commenced in February, 1913; how long did you continue?

A. Well, I cannot state the exact time which was required to prepare Exhibit "A," but on the entire records there were some two months I should say consumed.

Q. Where did you make your examination during those two months?

A. In what respect do you mean?

Q. In any respect—your examination of the records? A. You mean Exhibit "A"?

Q. No. I mean your examination of the records of the Western Fuel Company? [446—391]

A. Part of it was made at the office of the Western Fuel Company and the other at the custom-house.

Q. That is to say, you took some of the records of the Western Fuel Company to the custom-house?

A. I did.

Q. With the consent of the Western Fuel Company?

A. After they had been required to produce them before the Grand Jury.

* * * * *

Mr. McCUTCHEN.—Q. You did take the books to the custom-house, did you? A. I did.

Q. How long did you have them there?

A. Until I completed the preparation of these statements.

Q. How long did you have them there?

A. I don't know.

Q. About how long did you have them there?

(Testimony of W. H. Tidwell.)

A. A couple of months.

Q. How many men did you have at work on them during that time?

A. Well, I should say altogether that I had 6 or 8.

Q. Did you ask for any record while you were conducting that examination which was not produced to you?

A. I did, but they were finally produced, after it was stated to Mr. Olney, I believe, that the matter would be again called to the attention of the Grand Jury.

Q. You got the records nevertheless? A. Yes.

Q. Did you finish that examination without having every record of the Western Fuel Company which you requested to be produced?

* * * * * * *

A. In connection with all these records I had all that I asked for for the preparation of these statements.

Q. Did you request at that time, while you were conducting that examination of the books of the Western Fuel Company, the production [447—392] of any record that was not produced to you?

A. For an examination of these records, no.

Q. Was it before or after you had made that examination that you objected to these defendants having the privilege of examining the public records of the United States in the preparation of their defense? A. I think it was after.

Q. It was after; then after you had had full access to the records of the Western Fuel Company, you did

(Testimony of W. H. Tidwell.)

object to these defendants being permitted to examine the public records of the United States in the preparation of their defense, did you?

* * * * *

A. I had not had full access to the records of the Western Fuel Company.

* * * * *

Q. Will you specify any record which you had requested the privilege of examining and which had not been produced to you at the time the defendants sought to examine the public records of the United States and you prevented them from doing so?

A. The ledgers of the Western Fuel Company, for instance, and its vouchers for expenditures; also its donations of money and coal and other things to the employees of the Toyo Kisen Kaisha as well as the Pacific Mail Steamship Company.

Q. Now, tell us one voucher for which you requested the production and which had not been produced to you at the time you made objection to the defendants examining the public records of the United States for the purpose of preparing their defense.

A. I made no specific request for any particular voucher; all vouchers were requested.

Q. To whom did you make that request?

A. It was made in a subpoena that was issued to the Western Fuel [448—393] Company to produce the records.

Q. Now, Mr. Tidwell, I asked you whether you had asked for any voucher and I understood you to say

(Testimony of W. H. Tidwell.)

you had not; did you ask any officer or representative of the Western Fuel Company to produce any voucher which he failed to produce for you?

A. Not finally, no.

Q. What do you mean by finally?

A. After the various proceedings in court.

Q. I am talking about the time before you concluded this examination and during the time you were preparing Exhibit "A"; just confine yourself to that.

A. Then if you go back to that time, I answer no.

Q. You answer no. A. I do.

Q. You had not then, up to the time you finished these three exhibits, requested the production of any paper which the Western Fuel Company had not produced for you? A. That is true.

Q. Then, after you had finished these papers and before you had made any other requests, and while these defendants were preparing their defense to these indictments, did you object to their right to inspect the public records of the United States?

A. I did.

Q. And you say that you did that in the interests of justice? A. I did.

Q. Will you explain how that was in the interests of justice.

A. I did not propose that they should have the benefit of the Customs records if we could not have the benefit of their records.

Q. Then, when you stated that you refused to allow them to examine the public records and they re-

(Testimony of W. H. Tidwell.)

fused to let you have their records, you were mistaken, were you not? [449—394]

* * * * *

A. Why, no, I am not mistaken.

Q. Was that the only reason that you refused them access to the public records? A. Absolutely all.

Q. When was that refusal made?

A. I do not recall. You probably have the date there, haven't you?

Q. Was it not made during the time that you were examining their books and preparing exhibits A, B and C?

A. I should answer no, but I do not remember what the time was because I remember that when I made the objection to their seeing the records—

Q. (Intg.) What is that?

A. When I made the objection to their seeing the custom-house records it was on the very ground that they did not permit us to have all of their records, and if they wanted ours they would have to get them the same way we would have to get theirs.

Q. Did the Western Fuel Company furnish you with any papers after the first indictment was found?

Mr. ROCHE.—You mean recently?

Mr. McCUTCHEN.—No. What I am trying to develop is this, that the examination was continuous, that it began before the indictment was found and that it continued after the indictment was found without any interruption.

Q. Is not that true, Mr. Tidwell?

A. I am unable to answer that positively; I am in-

(Testimony of W. H. Tidwell.)

clined to think that they did. That is my best belief.

Q. Now, while you were continuing your investigation which began before the first indictment and continued for a long period after the finding of that indictment, is it not a fact that it [450—395] was during that time that these defendants sought the privilege of examining the public records of the United States and that you prevented them?

A. I can not state as to the time.

Q. You cannot state as to the time? A. No.

Q. But you do say that it was because they refused to let you have access to their records?

A. Yes, sir.

Q. And you are unable to state any record for which you called and which you did not get?

A. Up to a certain period.

Q. Up to the time that you prevented them having access to the public records?

A. When I prevented them having access to the public records was after they had declined to give us certain records that we asked for.

Q. What record did they decline to give you and which served as a basis for your instruction not to permit them to examine the public records?

A. They were various records which have since been produced.

Q. You knew that the records which they wanted to examine were the public records of the United States, did you not?

A. Well, now, that is a question.

Q. You have used them as public records, have you

(Testimony of W. H. Tidwell.)

not, in the preparation of these papers?

A. Yes, sir.

Q. You have had access to them all the time, have you not? A. Yes, sir, I have.

Q. And any other citizen of the United States could have had access to them by asking for them, could he not? A. Well, it appears not.

Q. Why does it appear not?

A. It appears that somebody declined to give you permission to [451—396] see them.

Q. You did that, did you not?

A. Yes, I did that.

Q. In your experience have you ever known or have you ever heard of that having been done before?

A. Not that I can recall.

* * * * *

Mr. McCUTCHEN.—Q. I have asked this question two or three times before, but I have not had an answer to it which is satisfactory to me, so I will ask it just once more: Will you name any paper, book, record or voucher of the Western Fuel Company for which you had asked and which had not been furnished you at the time you prevented the defendants from having access to the records of the United States in the preparation of their defense?

* * * * *

A. There was no specific paper or record which was asked for. The general records which were asked for under the subpoena were desired at that time, and because they were not delivered but were withheld I asked—I don't recall whether it was the former col-

(Testimony of W. H. Tidwell.)

lector or the present collector, to refuse to permit any one connected with the Western Fuel Company to see the records of the custom-house during that period.

Q. To what subpoena do you refer?

A. I don't know the date of it. There were various subpoenas, several subpoenas.

* * * * *

I don't know whether my request that the defendants should be denied access to the records herein referred to occurred before or after the appointment of Messrs. Sullivan and Roche [452—397] as special prosecutors in this case. I can not recall when said request was made at all. I do know that I made that request to one of the collectors; just which one I don't know. I did that in the interest of justice. I remember being present at the interview of Mr. Olney with Surveyor McKinlay. I do not recall that I said at that time that I did not think these defendants should have access to the public records, because they had not furnished me with their records. I do not recall the conversation that I then had with Mr. Olney. I remember being present, and that I met Mr. Olney in the hall, and he told me he was going to the office of the surveyor for the purpose of getting some records, and I went with him and the matter was discussed with Surveyor McKinlay. I do not recall whether or not I at that time assigned the failure of the Western Fuel Company to furnish me with records as the reason why I requested the surveyor not to give the Western Fuel Company certain records from the custom-house.

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—Q. Now, I ask you, Mr. Tidwell, to tell us anything you said on that occasion.

A. I don't remember anything special. If Mr. Olney will kindly refresh my mind on that subject I will be very glad to testify to it.

Mr. OLNEY.—I can do that with perfect ease if you want it right now.

The WITNESS.—I would be very glad to have it right now; I would just as soon testify to it now as at any other time.

Mr. OLNEY.—I met you in the hall, as you say, and went into the surveyor's office with you and told the surveyor what I wanted. You were there. And the surveyor said that that [453—398] was chiefly in your hands and in the hands of Mr. McNab, who was then the district attorney; we had some talk about it, and you said you thought the matter had better be referred to Mr. McNab, and you would take it up with him. That was the substance of the conversation.

Mr. McCUTCHEN.—Q. Do you remember that?

A. I do not.

Q. Your mind is a complete blank on that subject, is it?

A. Yes,—no, I would not say it is a complete blank because I remember the occurrence but I do not remember the conversation.

* * * * *

Q. You said that you had about half a dozen men working on the books of the Western Fuel Company, did you? A. Well, I had at least that many.

(Testimony of W. H. Tidwell.)

Q. And they continued for you say about two months?

A. Well, I would not say that all of them continued for two months, but there were 3 or 4 men who continued all of that time. There were others that I used at various times.

Q. What was the largest number of men you had employed on the books and records of the company at any one time?

A. I should say 6 or 8; I don't recall just exactly.

Q. When were Exhibits "A, B and C" offered as part of your testimony actually completed?

A. As to that I cannot say exactly, but it was about two months after work was begun on them. I did a great deal of this work. I did most of it except the actual clerical work.

* * * * *

Q. In the preparation of Exhibit "A" what papers and books did you use?

A. I used the vouchers of the Western Fuel Company. I used the custom-house entries; some of the custom-house records; also occasionally a dock book. I [454—399] think that is all.

Q. You say you used the custom-house entries and custom-house records; how do you distinguish between custom-house entries and custom-house records?

A. I refer to a record as a book which was kept in one document. The entries are here in evidence.

Q. When you say a book, do you mean those large books that are now in the room of the Circuit Court of Appeals?

(Testimony of W. H. Tidwell.)

A. No, sir. I think they were referred to occasionally though.

Q. They were used in the preparation of these statements, were they not?

A. I think they were referred to occasionally, but I don't remember any specific instance in which they were used.

Q. Is not the information contained in Exhibit "A" also contained in those custom-house books to which you have referred?

A. Why, yes, I should say it should be.

Q. Those are the books access to which Mr. Olney desired?

A. Well, he asked for the records. I suppose he meant those.

Q. You knew he referred to those at the time, did you not? A. Yes, I think so.

Q. And those are the records you refused him to have access to?

A. Yes. I will add, however, that those records have been at your disposal for the past week or 10 days.

That is to say, you waited until this trial actually began before you gave us access to those records?

A. They were produced as soon as you asked for them.

Q. What do you mean by that?

A. I was informed that you wanted to see the records and I had them sent up here to this building.

Q. That was after this trial began.

A. Yes. [455—400]

Q. At all times before the trial began, when the

(Testimony of W. H. Tidwell.)

defendants requested the privilege of examining those records you denied them that privilege, did you not? A. I only recall Mr. Olney being there once.

Q. You never sent word to Mr. Olney that you had changed your mind about it, did you?

A. I don't recall the conversation which Mr. Olney says took place.

Mr. ROCHE.—These books, Mr. McCutchen, were produced here by us at your request simply because you wanted them brought out here. There were no subpoenas issued for them. There is no question about that, is there?

Mr. McCUTCHEN.—Oh, I understand, Mr. Roche, that you very kindly produced the books when we said we wanted them. Of course, there is no question but that we could have demanded the production of the books, and they could have been produced here. While you extended the courtesy to us of having the books brought out here, Mr. Roche, I do not think the Government is entitled to any very great credit for that because we could have had them produced here.

Mr. ROCHE.—I understand that, Mr. McCutchen, but you do not intend to insinuate, do you, that you did not have access to these records before they were brought out here?

Mr. McCUTCHEN.—Those are the very books to which we did desire access and which this witness prevented us having access to.

Mr. ROCHE.—But that was months ago.

* * * * *

Mr. McCUTCHEN.—Q. You do not recall that

(Testimony of W. H. Tidwell.)

you ever sent word to Mr. Olney that you changed your conclusion or your determination with reference to his right to examine those books, do you? [456—401]

A. As I said a few moments ago, I do not recall, Mr. McCutchen, that any promise was ever made to Mr. Olney.

Q. I am not asking you about any promise; I am asking you now if you are not absolutely certain you never sent word to Mr. Olney that his request to examine those books would be granted.

A. I never sent him any request.

Q. I don't say request; I say you never sent him any word that his request would be granted?

A. No, I never sent him any word.

Q. After you had that conversation with Mr. Olney, did you file or make any protest with or to any Government officer with reference to Mr. Olney's right to examine the books?

A. I do not recall at the time whether it was before or after the conversation which Mr. Olney says that we had, as to whether I made the request before that time, or after.

* * * * * * *

The WITNESS.—A certain matter has come to my mind by which I can establish when I made the request of the collector of customs not to permit the defendants to see those records.

Mr. McCUTCHEN.—Q. What is the date?

A. I cannot tell you here, but I can tell you from my office records.

(Testimony of W. H. Tidwell.)

Q. What is the circumstance?

A. It was a dispute with Collector Stratton.

Q. And you have a record of that?

A. Yes; I can establish it by that date—the date.

Mr. ROCHE.—Q. Will you get that date during the noon recess for us? A. Yes, I will. [457—402]

I know from my examination of the custom-house records that a record is made of every cargo of imported coal that comes into this port of San Francisco. After the cargo has been discharged a note is made in a book which shows whether there is an overage or a shortage. That is done within a reasonable time after the discharge. The first ship that discharged in February, 1911, was the “Puritan.” There was a shortage in that case. While I could not say positively how soon that shortage would be entered in our books, it certainly would be known within a month. The custom-house records were referred to when necessary in the preparation of my Exhibit “A,” and such records should, as I have just said, show within a month after the discharge of the “Puritan” what her shortage was; and that is so not only with reference to every shortage, but, as to the out-turn weight of every cargo, whether there would be a shortage or an overage.

Q. You have taken every case in which there was a shortage for the purpose of preparing your Exhibit “A” as evidence of a fraudulent entry on the part of the Western Fuel Company, have you not?

* * * * *

(Testimony of W. H. Tidwell.)

A. It has so been stated in making a claim on the entire shortage; but we have not only taken the shortages on Exhibit "A," but we have taken all coal received by the Western Fuel Company, which includes overages as well as shortages.

Mr. McCUTCHEN.—Q. In the preparation of Exhibit "A" have you not taken every shortage as a fraudulent entry? A. Yes, sir.

Q. Now, turn to that particular ship that you spoke of a moment [458—403] ago as having been discharged in 1911, what was the name of it?

A. In February, 1911?

Q. Yes. A. The "Puritan."

Q. Where did she discharge, if you know?

A. I don't know.

Q. And you say there was a shortage in that case?

A. Of 22 tons, 241 lbs.

Q. And for the purpose of reaching your aggregate you have treated that shortage as a fraudulent one, have you not? A. Yes, sir.

Q. Do you know anything about the facts with reference to that entry? A. I do not.

Q. What was the next case of shortage?

A. The next case of shortage was the "Strathblane."

Q. What was the amount of shortage in that case?

A. 30 tons, 784 lbs.

Q. For the purpose of arriving at your aggregate of 20,700 odd tons, you have treated that as fraudulent, have you not? A. I have.

Q. Now, when you have come to an overage, have

(Testimony of W. H. Tidwell.)

you also treated that as fraudulent?

A. I have not.

Q. Why not? A. For the reason that the company paid duty on that amount.

Q. How do you know that the company paid duty on enough even in that case?

A. I don't know, but it is the best I could get from the records.

Q. You do, however, in every case where there is a shortage, if I may repeat it, treat that shortage as a fraudulent shortage? A. Yes, sir.

Q. And that applies to every case in your Exhibit "A" where there [459—404] was a shortage?

A. Yes, sir.

Q. By the way, in your examination of these records of the custom-house, did you go so far as to investigate other importations of coal, or importations of coal by other importers than the Western Fuel Company?

A. Do you refer to those which were sold to the Western Fuel Company?

Q. No, I refer to all importations of coal after we will say, April, 1906, and which are recorded in those custom-house books to which you have referred.

A. I have made no special investigation of any other company excepting the Western Fuel Company.

Q. You say you have not made any special investigation? A. Yes.

Q. But did you not, in the course of the investi-

(Testimony of W. H. Tidwell.)

gation which you did make, examine the records of the custom-house, or some of them, with reference to importations of coal by importers other than the Western Fuel Company?

A. No, I did not, but I examined the records and entrys of other importers who had sold to the Western Fuel Company.

Q. But you made no examination, as you have said, with reference to importations of other coal importers who did not sell to the Western Fuel Company.

A. No, I had none of those under consideration at all.

Q. And you had not the curiosity to examine the records of the custom-house to see what the experience was with reference to those importations?

A. I had not those under investigation at all.

Q. Well, I say you had not the curiosity to learn what the experience was in cases of that kind?

A. Well, I had not considered it at all. [460—405]

* * * * *

Mr. McCUTCHEN.—Q. Now, you say that this record of yours indicates the place of discharge of coal under some circumstances; that is true, is it?

A. Yes, sir.

Q. Under what circumstances does it indicate the places discharged?

A. Well, I don't know that I fully grasp your question.

Q. You say that in some cases you have the initial

(Testimony of W. H. Tidwell.)

“O,” and in other cases, you have the word “Eureka,” or the initial “E,” and in other cases the initials “S. D.”

A. I can explain that to you. For instance, if a cargo is discharged at San Diego, while it is taken up on the records of the books of the Western Fuel Company at San Francisco as a receipt by the company, but not at San Francisco, and as a sale of the San Francisco office, the entry of the merchandise is actually made at the port of San Diego.

Q. By the Western Fuel Company?

A. No, sir, by the party to whom the coal was sold; in the case of San Diego, it was to the Spreckels Commercial Company, I think.

Q. That is to say, in the San Diego case, the entries were not made by the Western Fuel Company.

A. No, sir, they were not.

Q. And yet, you have charged the Western Fuel Company, here, with having made those entries, and you have charged that those entries were fraudulent, have you not?

* * * * *

A. Yes, sir. The Western Fuel Company would take up the amount on its own books as coal received at San Francisco, and also take it up as coal [461—406] received at San Francisco, and so it was treated as a San Francisco transaction, except as to the entry and the discharge of the coal.

Mr. McCUTCHEN.—Q. Is that the only explanation you have for having charged the Western Fuel Company with having made a fraudulent entry in

(Testimony of W. H. Tidwell.)

each of those San Diego cases? A. Yes, sir.

Q. That is the only evidence you have; and you consider that that warranted you in making the charge against the Western Fuel Company that it had fraudulently entered each one of those cargoes?

A. Yes, sir.

Q. Do you know what any one of those cargoes weighed?

A. I do not, other than what the record shows.

Q. You have no information on it whatever?

A. Other than what the record shows.

Q. And yet, in each one of those cases you have solemnly charged these defendants with having made fraudulent entries of those cargoes.

A. No, sir, I have not charged the defendants with making fraudulent entries, because they do not make the entry.

Q. Why, then, did you include those shortages in your total of 20,700 tons?

A. For the reason that the Western Fuel Company swears before the American Consul that there is that much coal on that ship, and it is not natural to suppose that the company is going to send its ship to a foreign port with less coal than she can carry—the invoice weight.

Q. And it is on that assumption you base the charge that the Western Fuel Company defrauded the Government of revenue on those San Diego discharges? A. Yes, sir. [462—407]

Q. You have said you also examined the books of

(Testimony of W. H. Tidwell.)

the Western Fuel Company to determine the sales it has made?

A. I have examined not the books, but their sales sheet.

Q. Now, I understand you to say that it is your understanding—and I assume that it was your understanding when you prepared Exhibit “A”—that in no one of the San Diego cases did the Western Fuel Company have anything to do with the discharge of the cargo.

A. That is my understanding.

Q. That is your understanding, is it?

A. Yes, sir.

Q. And it was your understanding when you prepared Exhibit “A”? A. Yes, sir.

Q. And you knew, when you included those shortages in your total of 20,700 tons, that the Western Fuel Company had nothing to do with the discharge of any part of that tonnage at San Diego?

A. No, I could not say that they had nothing to do with the discharge; I know that the entry was made in the name of other other parties who purchased the coal.

Q. You presented that exhibit here, did you not, for the purpose of sustaining the claim that the Western Fuel Company had short-weighted the Government? A. Yes, sir.

Q. And you knowingly included those San Diego discharges in your Exhibit “A” for the purpose of sustaining that shortage, did you not? A. I did.

Q. Now, will you turn to your record; I have in-

(Testimony of W. H. Tidwell.)

licated here the page of your Exhibit "A" from which these cargoes are taken; turn to page 1 of your exhibit, here.

The "Reider," discharged at San Diego, shows an invoice [463—408] weight of 5810 tons, and the custom-house weight, 5668 tons, 770 pounds, a shortage of 141 tons, 1470 pounds. The "Titania," on page 3 of Exhibit "A," likewise discharged at San Diego, shows an invoice weight of 5650 tons, and a custom-house weight of 5563 tons, 2010 pounds, giving a shortage of 86 tons, 230 pounds.

Q. Turn to page 6, to the "Tordenskjold."

A. All right.

Q. What is her invoice weight? A. 5907.

Q. What was her custom-house weight?

A. 5622 tons, 2090 pounds.

Q. What was the shortage, if any?

A. 284 tons, 150 pounds.

Q. Turn to page 8.

Mr. ROCHE.—What was the last one?

A. 284—150.

Mr. McCUTCHEN.—That was one of your samples, Mr. Roche, by the way, when you were exploiting these percentages to the jury.

Q. Turn to page 8, the "Titania."

A. The "Titania."

Q. What was her invoice weight. A. 5621.

Q. And her custom-house weight?

A. 5392 tons, 2140 pounds.

Q. And the shortage?

A. 248 tons, 100 pounds.

(Testimony of W. H. Tidwell.)

Q. Now, turn to page 11, to the "Tordenskjold"; what was her invoice weight?

A. 5963—wait a minute.

Q. I am afraid you will say my eyes are bad again.

A. That is San Diego.

Q. I have said San Diego seventeen times. I want you to confine [464—409] yourself to San Diego.

A. There are two "Tordenskjold" at San Diego on this page.

Q. Take the first one, then.

A. The first one is wrong. The second one is the one we want. "Tordenskjold," 5706 tons.

Q. That is the invoice weight of it? A. Yes.

Q. What is the out-turn weight or custom-house weight? A. 5690 tons, 40 pounds.

Q. And the shortage?

A. 15 tons, 2200 pounds.

Q. Now, take the case of the "Bessie Dollar." This is another one of your exploitations, Mr. Roche.

A. What page is that?

Q. Page 14. A. 6825.

Q. And the custom-house weight?

A. 6446—1428.

Q. And the shortage? A. 378—812.

Q. The "Tordenskjold," page 19, what is the invoice weight of that? A. 5752.

Q. And the custom-house weight?

A. 5586—959.

Q. And the shortage, if any? A. 165—1281.

Q. Now, the "Titania," page 20. A. 5929.

(Testimony of W. H. Tidwell.)

Q. And the custom-house weight?

A. 5861—410.

Q. And the shortage, if any? A. 67—1830.

Q. Now, the "Thor," page 22.

A. 7425; 7376—1630 pounds; shortage, 48—610.

Q. The "Thor," page 24.

A. Invoice, 7277; out-turn, 7207—180; short, 69—2060.

Q. The "Thor" again, page 26. You find, by the way, do you not, that each of those is a San Diego discharge?

A. Yes. There is 7318 invoice; ascertained, 7216, I believe it is, 1210 pounds; short 101 tons, 1030.

Q. Page 32, the "Thor"?

A. 7234 invoice weight; 7166—49 ascertained weight; shortage, 67—2191 [465—410]

Q. Page 37, the "Thor"?

A. 7198 invoice; 7151—950 ascertained; 46 tons, 1290 pounds short.

Q. Page 37½ of the "Thor"?

A. Is that also San Diego?

Q. That is San Diego.

A. The record does not show whether that is San Diego or not.

Q. It is San Diego, in fact.

A. It is. 7244. 7206—1960; short 37—280.

Q. Is it 27 or 37? A. 37—280.

Q. Now, according to this chart, Mr. Tidwell, the aggregate of the invoice weights of those cargoes is 90,896 tons, and the aggregate of the custom-house weights is 89,177 tons, 146 pounds, making a differ-

(Testimony of W. H. Tidwell.)

ence of 1738 tons, 2094 pounds. Of course, in view of Mr. Roche's suggestion, I won't commit you to the correctness of the additions.

A. That is accepted subject to correction.

* * * * *

Q. Your exhibit "A" was prepared on the theory, was it not, that in each of these cases, delineated upon this chart these defendants had knowingly and willfully short-weighted the Government on those cargoes.

* * * * *

A. Yes.

Q. Now, you have told us that you also examined the sales-books of the Western Fuel Company, have you not? A. The sales sheets.

Q. Didn't you say that you had examined the sales of the company?

A. I said the sales sheets which are in evidence.

Q. Well, you have said that these cargoes were actually discharged [466—411] by J. D. Spreckels and Brothers, haven't you?

A. I think all of the entries are in their names.

Q. All of the entries are in their names. Do you know on what weights they paid for the coal?

A. I should say they paid on the out-turn weights.

Q. You should say they did. Didn't you know that to be the fact?

A. No, I have not seen the records of the Western Fuel Company.

Q. Didn't you state on your examination in chief that you had examined the sales records of the West-

(Testimony of W. H. Tidwell.)

ern Fuel Company? A. I did not.

Q. Then you say that it is your impresssion, and was your impression at the time you prepared Exhibit "A" that that coal had been paid for by J. D. Spreckels & Brothers on the out-turn weight?

A. That is my understanding of it.

Q. And yet you charge these defendants with having fraudulently swindled the Government out of the duty on that 1738 tons? A. I did.

Q. Notwithstanding the fact that the company, the Western Fuel Company, was only paid for 89,157 tons?

A. That may be a fact, and it may not be. I am not able to say.

Q. But you say you assumed that at the time you made this statement. Have you any other explanation for having included those cargoes in this list of so-called fraudulent discharges? A. None.

Q. None, whatever? A. No.

Q. You considered that you were justified in making that charge upon that information alone?

A. I do.

* * * * *

[467—412]

Q. This 1738 tons is included in your total of 20,700, of the duty on which you say these defendants swindled the United States Government, is it not?

* * * * *

A. Yes.

Q. Then you knew at the time you included them in that 20,700 tons that this defendant, that the West-

(Testimony of W. H. Tidwell.)

ern Fuel Company and none of these defendants had had anything in the world to do with the discharge of any one of these cargoes?

A. No, I did not know that.

Q. Did you know that they had? A. I did not.

Q. You have got as much information on that subject now as you ever had? A. Yes.

Q. And, without having had any information at any time upon that subject, you charged these defendants with having swindled the Government out of the duties on that 1738 tons? A. Yes.

Q. Did you ever go to San Diego in the course of your investigation? A. I did not.

Q. Did you send anybody there? A. I did not.

Q. How did you learn that these discharges had been effected by J. D. Spreckels & Bros. and not by the Western Fuel Company?

A. I sent down for the entries.

Q. You sent for the entries. Did you do that before you prepared Exhibit "A"?

A. I did it while it was in preparation.

Q. While "Exhibit A" was in preparation you learned that the Western Fuel Company had absolutely nothing to do with the discharge of any one of these cargoes? [468—413]

A. I have not so testified.

Q. Read the question. (Last question repeated by the reporter.)

A. I don't know whether they did or not.

Q. You say you know as much on the subject now as you ever knew. That is a fact, isn't it?

A. Yes.

(Testimony of W. H. Tidwell.)

Q. And you don't know now that the company had anything to do with the discharge of any one of those cargoes? A. I do not.

Q. Then you did not know that at the time that "Exhibit A" was prepared by you?

A. I did not.

Q. But, nevertheless, you included those in Exhibit "A" upon the theory that the Western Fuel Company had fraudulently cheated the Government out of the duty on that coal? A. Yes.

* * * * *

Mr. McCUTCHEN.—Q. Mr. Tidwell, in your Exhibit "A" you have a total of coal received, have you not? Will you give us that total?

A. For the entire period of that exhibit?

Q. Yes.

Mr. ROCHE.—You mean the out-turn weight or the invoice weight?

Mr. McCUTCHEN.—I am coming to that.

A. The total amount received, according to the Western Fuel Company's records is 2,138,831 tons, 472 pounds.

Q. That is what? Is that the invoice weight?

A. You have asked for the amount received—the ascertained weight.

Q. That is the ascertained weight? A. Yes.

Q. What did that coal weigh?

Mr. ROCHE.—You mean its actual weight?

[469—414]

Q. Yes?

A. I don't know that I can answer the question.

(Testimony of W. H. Tidwell.)

Q. Why can't you answer it?

A. Because I did not weigh it.

Q. Therefore, you don't know what its weight was?

A. No.

Q. You can't throw any light, then, on that subject to the jury? A. Oh, yes, I can.

Q. What can you throw beyond what you have already thrown?

A. The invoice weight shows it to be 2,159,551 tons, 1147 pounds.

Q. Were those invoice weights correct? Did they represent the exact weight of the coal at the time it arrived here?

A. From the discoveries made yesterday, it was probably incorrect.

Q. In the case where that was not the case, do the invoice weights represent the exact weight of the coal at the time it arrived here?

A. So far as we know, yes.

Q. How far do you know?

A. As far as the invoice shows?

Q. That is as far as you do know? A. Yes.

Q. That is all you know on the subject?

A. Yes.

Q. Whether those invoice weights were correct, or not, you don't know? A. No.

Q. Whether the ascertained weights were correct, you don't know? A. We claim they were not.

* * * * * * *

Q. You stated that the weights with which Mr. Mills charged his barges were the ascertained weights? A. Yes.

(Testimony of W. H. Tidwell.)

Q. And you went into quite an elaborate calculation to show that there had not been as much coal delivered to steamers as Mr. Mill's barge weights indicated, did you not? [470—415]

A. Yes.

Q. For the purpose of determining the quantity of coal out of the duty on which the Government was defrauded, you treated the ascertained weights as the actual weights, did you not? You treated the bill of lading weights as the actual weights, didn't you?

A. I do not quite get that.

Q. For the purpose of ascertaining the quantity of coal out of duty on which the Government had been defrauded, you treated the bill of lading weights as the actual weights, didn't you? A. Yes.

Q. Did you treat the bill of lading weights as the actual weights when you came to make up the percentage of overage on barge deliveries?

A. I did not.

Q. Why not?

A. Because Mr. Mills' books would show that only a certain amount of tonnage had gone into the barge. It did not show an entire cargo going into the barge.

Q. Is that the only reason? A. Yes.

Q. Now, let us see if I understand you. The only reason that you took the ascertained weight for the purpose of determining the overage on the barges was that only parts of cargoes went into the barges, is that true? A. That is true.

Q. Didn't you state repeatedly during your examination in chief that the weights with which the

(Testimony of W. H. Tidwell.)

barges were charged were the ascertained weights?

A. Yes, they were the ascertained weights. I still state it.

Q. They were the ascertained weights?

A. Yes, so shown by the records of the Western Fuel Company.

Q. And in no case was the barge charged with the bill of lading weights; is that true?

A. Not to my knowledge.

Q. Well, then, if you say that the ascertained weights did not [471—416] represent the correct weight, so far as the importations are concerned, why do you say that the ascertained weights represent correct weights when you come to determine overages on barges?

A. We are not treating them as whole cargoes on the barges, we are simply treating with partial cargoes, and as far as Mr. Mills' books would show, coal would go into the barges.

* * * * *

Q. Now, then, for the purpose of determining the quantity of coal out of the duty on which the Government was defrauded, you took the bill of lading weights as the actual weights of the cargoes, didn't you? A. Yes, I did.

Q. And you took the custom-house weights as incorrect weights of the cargoes, didn't you?

A. In some instances.

Q. In nearly every instance?

A. No, for the reason that there were many partial cargoes—let me get that question. I did not quite get it.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—In your question, Mr. McCutchen, you included partial cargoes, which represent a considerable quantity of this coal.

(The last question repeated by the reporter.)

A. There were many partial cargoes on which the invoice weight of the coal was not shown at all.

Mr. McCUTCHEN.—Q. Can you give us any impression of how the aggregate weight of partial cargoes compares with the aggregate weight of entire cargoes in your Exhibit “A”?

A. It is in evidence, here, but I cannot give you the amount.

Q. It is almost infinitesimal, isn't it?

A. I would say so.

Q. Is it one per cent, according to your impression? [472—417]

A. I don't recall what the figures are. To the best of my memory it is about, I would say about 25 per cent.

Q. That is to say, partial cargoes represent about 25 per cent?

A. I am estimating that. It can be found out from one of the exhibits. I don't recall what the exhibit shows.

Q. Then, in all other cases, you have treated the invoice weights as incorrect weights, haven't you?

A. Yes.

Q. That is to say, for the purpose of determining the quantity of coal out of the duty on which the Western Fuel Company defrauded the Government?

A. Yes.

(Testimony of W. H. Tidwell.)

Q. For the purpose of determining overages on barge deliveries, what weight did you take as the correct weight?

A. I could only take the weight which was shown by Mr. Mills' books had been loaded into the barge.

Q. You stated on your direct examination that those were custom-house weights, didn't you?

A. Yes, I so understand, except where they remove coal from the yard and place it on the barges.

Q. That is to say, for the purpose of showing that these defendants were guilty of a fraud on importations, you treated the custom-house weights as incorrect weights? A. Yes.

Q. And for the purpose of showing that the Western Fuel Company had been a party to defrauding the Government in the collection of drawbacks you treated the custom-house as correct weights, did you not?

* * * * * * *

A. Yes, for the reason that they were the only weights that we had to show the amount of coal which went into a barge. When the question of payment of drawback arose, drawback was paid on the out-turn weights. To illustrate, if the barge would show 1000 [473—418] tons was received on board, the duty would only be paid on 1000 tons; if the out-turn weight was 1200 tons, the drawback would be paid on 1200 tons.

* * * * * * *

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—Q. I won't apologize for this question, because your Honor has heretofore appointed me percentage man on our side of the case. I am going to ask the witness if he will tell the jury what is the percentage of shortage on these San Diego deliveries.

Mr. ROCHE.—You mean for him to make the calculation, do you?

Mr. McCUTCHEN.—Yes, I would like to have him make the calculation and tell the jury the percentage of shortage on those deliveries.

A. It is a little bit less than 2 per cent.

Q. It is higher, is it not, than your percentage obtained by grouping all the cargoes that were short, as shown in your Exhibit "A"?

A. You mean the total of all received and the total of all—the total invoice weight and the total out-turn weight?

Q. Yes. A. Yes, sir.

Q. You gave a percentage derived by taking all of the short cargoes set forth in your Exhibit "A," did you not?

A. Well, there was a statement to that effect which, as I recollect now was about 1.84.

Q. This percentage is higher than that, is it not?
[474—419]

A. I have not figured it down to the exact percentage, but it is about that.

Q. Have you not figured it far enough to know that it was higher than that percentage?

A. I will do it if you wish me to.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Mr. McCutchen, did you say that the witness presented a table?

Mr. McCUTCHEN.—I did not say that he presented a table, but I said that the witness answered a question put to him by you as to what was the percentage of shortage on short cargoes only as set forth in his Exhibit “A”? A. This would be 1.92.

Q. In other words, it is higher than your statement heretofore made of the percentage of shortage on all the short cargoes set forth in your Exhibit “A”?

A. Yes, sir.

Q. Just before the Court went into recess you were being examined with reference to weights with which the barges were charged? A. Yes, sir.

Q. If those barges had been charged with the invoice weights which you now say were the correct weights instead of the custom-house weights, what, if anything, would have been the overage?

Mr. ROCHE.—I object to the question, if your Honor please upon the ground that the witness has not said that the invoice weights were the correct weights.

Mr. McCUTCHEN.—He has said that he has taken them as the correct weights for the purpose of determining and arriving at the 20,700 odd tons out of the duty on which he says these defendants defrauded the Government.

Mr. ROCHE.—That, of course, is correct, if your Honor please, but that is not the question which counsel has asked. [475—420]

Mr. McCUTCHEN.—Let us have the question read.

(Testimony of W. H. Tidwell.)

(The question was here read by the Reporter.)

Mr. ROCHE.—You are assuming that the weights are correct?

Mr. McCUTCHEN.—No, I am not assuming that the weights are correct.

The COURT.—Well, let the witness answer the question.

A. I am unable to say.

Mr. McCUTCHEN.—Q. Why?

A. For the reason that total cargoes did not go into the barges.

Q. Supposing the barges had been charged with invoice weights in cases where the total cargoes went into the offshore bunkers, from which bunkers the barge coal was drawn, instead of the custom-house weights, would the overage to which you have testified have been smaller or greater?

Mr. ROCHE.—I object to the question because thus far it has not appeared in the testimony that any single cargo or any whole cargo was ever entirely delivered to any offshore bunker or to any of the pockets of the offshore bunker.

Mr. McCUTCHEN.—It does seem to me that that is a peculiar objection for counsel to make, may it please your Honor. This witness has said in response to a question—

The COURT.—Mr. McCutchen, I am prepared to overrule the objection the moment I get a chance to rule. The objection is overruled.

Mr. McCUTCHEN.—Very well, your Honor, I am sorry that I anticipated your Honor.

(Testimony of W. H. Tidwell.)

A. The overage of an entire cargo if an invoice weight had been taken up on a barge would have been smaller.

Q. The overage would have been smaller?

A. Yes, sir. [476—421]

Q. Then, for the purpose of making the overage as large as possible, you have said, when it came to determining the shortage on importations, that the invoice weight was the correct weight, but that when it came to determining the overage on barges you have said that the custom-house weight was the correct weight, have you not?

A. Yes, and they are both correct.

Q. Will you explain to us how that is?

A. When a vessel is being discharged considerable coal goes into the bunkers which does not go over the scales, according to information, and consequently the coal incoming weighs short. When it is laden into the barge every lb. of it which goes into the barge or through the offshore bunkers is actually weighed; and in addition to that the coal is being discharged over the inshore bunkers, where the coal drops into the inshore bunkers, but is never discharged, so far as I am informed, over the offshore bunkers when that coal can drop into the offshore bunkers; consequently every lb. of coal that goes into the offshore bunkers is actually weighed.

Q. Does not that reason simply accentuate the difference instead of explaining it? Does it not occur to you that it does?

A. I don't catch the full meaning of your question.

(Testimony of W. H. Tidwell.)

Q. You don't catch the full meaning of it?

A. No, sir.

Q. In other words, you say the coal which went into the bunkers actually weighed more than the custom-house weights?

Mr. ROCHE.—In what bunkers?

Mr. McCUTCHEN.—I don't care,—in all the bunkers?

A. There is a difference in the bunkers.

Q. Very well, we will withdraw that question. Do you say that [477—422] the coal which went into the offshore bunkers did not weigh any more than the custom-house weight? A. Yes.

Q. You say that it did not? A. It did not.

Q. It weighed exactly the custom-house weights?

A. And on which the company paid duty.

Q. How do you know that, Mr. Tidwell?

A. From the records which have been introduced in evidence.

Q. What records?

A. The records of the Western Fuel Company.

Q. Tell us what records you refer to particularly.

A. I was referring to the yellow sheet of the discharge of the ship which is signed, I believe, by Mr. Mills, and which Mr. Hahn testified to.

Q. That was one sheet, was it? A. Yes, sir.

Q. And do you make that statement on the strength of the showing of that one sheet?

A. There are others; that is the only one that has been placed in evidence.

Q. That is the only one that has been placed in evi-

(Testimony of W. H. Tidwell.)

dence. Now, you do say that notwithstanding the fact that your claim is that the invoice weights were the correct weights on importations the custom-house weights were the correct weights on deliveries to barges? A. Yes, sir.

Q. And your explanation for that is the one you have just made? A. Yes, sir.

Q. Do I understand your testimony to be that in your opinion all of the coal which went into the off-shore bunkers was honestly weighed?

A. Yes, sir.

Q. And that the coal dishonestly or fraudulently weighed went into the other bunkers? [478—423]

A. Went into the inshore bunkers.

Q. Now then, having said, as I understand you, that the weights charged against the barges were the correct weights, will you explain to the jury again how you arrived at that total overage?

A. The difference between the amount which was credited to the barge, or debited to the barge, and the amount which was removed from the barges or laden on to the vessels.

Q. Oh, no. I say your total overage. You have said that we had an overage of something like 61,000 tons. Will you explain again how you got at that?

A. Yes. It is the difference between the amount of coal received as shown by the company's records and the amount that was sold.

Q. Did you not, in answer to a question put to you by Mr. Roche, attempt to specify the items that went to make up the whole 61,000 tons?

(Testimony of W. H. Tidwell.)

A. I only specified that up to about 43,000 tons.

Q. And where did you get the 43,000 tons?

A. Overrun on the barges.

Q. The 43,000 tons was overrun on the barges?

A. It was 33,000 tons from January, 1906, to November, 1912, and about 10,000 tons in 1904 and 1905; that is my remembrance of the figures.

Q. Let us confine ourselves for a moment to the period between April, 1906, and the 31st of December, 1912. Just explain to the jury the detail of your method of arriving at the total overage during that period.

A. I accepted the amount which had been received according to the records of the Western Fuel Company and subtracted that from the amount of sales by the Western Fuel Company during that same period of time. [479—424]

Q. That is to say, you mean you subtracted the custom-house weights from the sales? A. Yes, sir.

Q. Do I misunderstand you then in thinking that you did give the detail of those figures?

A. I don't recall giving the detail. I remember reading from Exhibit "C" certain items there which made up 33,000 tons, and again from the additional Exhibit "C" which made up about 10,000 tons. I also recall Mr. Roche asking me the difference between the two, which was something like 28,000 tons.

Q. The difference between what?

A. The difference between 33,000 and 61,000.

Q. You say that the total overage on the barges was 43,000, do you not?

(Testimony of W. H. Tidwell.)

A. In January, 1904, it was—

Q. (Intg.) Oh, I understand; that goes back to a later period. A. Yes.

Q. How did you say that you arrived at the total overage, if I may ask you the question again?

A. By deducting the amount of coal received by the Western Fuel Company from the amount sold.

Q. That is to say, you deducted from the amount sold—

A. (Intg.) And the amount on hand and the amount burned, I should have added.

Q. You deducted from the amount sold and on hand and burned the custom-house weights?

A. Yes, sir.

Q. Now, supposing you had deducted the invoice weights would that have made any difference?

A. It would have made a larger overage.

Q. It would have made a larger overage?

A. Yes, sir.

Q. Now figure that out for us, Mr. Tidwell. Where is your [480—425] Exhibit “A”?

A. I think it is here somewhere. I want Exhibit “A” and Exhibit “B” also.

Q. I think it is all set forth at the end of your Exhibit “A,” is it not?

A. No, sir. I am mistaken about that, it would have been a smaller overage.

Q. Well, what would it be?

A. 41,276 tons.

Q. Now, is not that the overage according to your statements heretofore made?

A. I never mentioned the figures before.

(Testimony of W. H. Tidwell.)

Q. You have stated that the invoice weights were the correct weights of the coal received here, have you not? A. That is our claim.

Q. If that be true, then the overage is only 41,000 tons instead of 61,000 tons; is not that true?

A. Yes, but they did not pay duty on the difference between those two amounts.

Q. Well, we will come to that later on.

A. But I want to answer that now, they did not pay duty on the difference between the invoice weights and the ascertained weights.

Q. What has that to do with the quantity of coal which was actually received, and which must be used to determine the overage?

A. As to that I cannot answer.

Q. As a mathematician can you not tell that? Let me put that question to you in another way. You have stated before the jury a number of times, have you not, that the Western Fuel Company had sold 61,000 more tons than it actually paid duty [481—426] on, or received?

A. No, sir; I did not say actually more than it had paid duty on; I said actually more than it had received, according to its records.

Q. What do you mean by according to its records?

A. The records of the Western Fuel Company.

Q. Now, if the invoice weights were correct, that excess was only 41,000 tons, was it not?

A. Evidently.

Q. And you say that the invoice weights were correct? A. That is our claim.

(Testimony of W. H. Tidwell.)

Q. Now, will you tell us what the percentage of that overrun is, or shortage? A. To what?

Q. To the total amount which you said was sold?

Mr. ROCHE.—Do you concede that the invoices were correct?

Mr. STANLEY MOORE.—We are examining the witness, Mr. Roche; you ought not to interrupt.

Mr. McCUTCHEN.—How long have you had this witness on the stand, Mr. Roche?

A. I don't think you meant just exactly what you said, Mr. McCutchen.

Q. Possibly not; suppose you answer it just as you think I meant it and if your answer does not satisfy me I will put another question.

A. I cannot answer it as you ask it.

Q. What percentage does that overage ascertained in the way that I have suggested to you bear to the total sales? What percentage does that difference of 41,000 and odd tons bear to the total sales of coal of the company during that period?

A. It is about 2 per cent, I think.

Q. What is the total on which you figured it? What is the total [482—427] of the invoice weights?

A. I did not figure on the invoice weights; you said sales weight.

Q. Figure it now on the invoice weight. What is the total of the invoice weight? A. 2,138,831.

Q. What is the percentage? What is the total invoice weight—will you state it again?

(Testimony of W. H. Tidwell.)

A. I have just given it to you, 2,138,831.

Q. Now, see what that percentage is.

Mr. STANLEY MOORE.—That, Mr. Tidwell, is the bill of lading weight that you are giving us. He is asking you to figure it on the invoice weight.

A. That is what I am figuring it on.

Q. What do you say the invoice weight is?

A. 2,138,831.

Q. We have it here as 2,159,551.

A. That is the invoice weight.

Q. That is what he is asking you.

A. I misunderstood you then. It is approximately 1.8 per cent.

Mr. McCUTCHEN.—Q. 1.8 per cent?

A. Either 1.8 or 1.9; it is just between; it is just a difference between 1.8 and 1.9.

Q. Then, according to your theory the Western Fuel Company sold only 1.8 per cent more coal than it actually received?

A. Yes, according to this statement here.

Q. Well, according to your statement.

A. According to our theory; but in many instances in the discharge from the barges it would amount to 2 or 3 per cent; I think in some instances as much as 20 per cent. This is a general average. [483—428]

Q. I understand you to say, Mr. Tidwell, that in your opinion the coal that went into the offshore bunkers was correctly weighed? A. Yes, sir.

Q. That is to say, you mean the coal which went into the offshore bunkers and the Folsom Street bunk-

(Testimony of W. H. Tidwell.)

ers, and which were weighed at the Folsom Street scales and to which reference has been made here—

Mr. ROCHE.—Just a moment, Mr. McCutchen. We object to that question, if your Honor please, as calling for the conclusion of the witness. We haven't any objection to counsel asking the witness whether it is upon that theory that this calculation was made, but the opinion of the witness one way or the other of course cuts no figure in this litigation.

The COURT.—That is quite true. You can ask him if these calculations were made upon that basis, but to ask him what he thinks about the matter, what he thinks about the matter is no more binding upon the jury than my opinion would be or your opinion would be.

Mr. McCUTCHEN.—Q. Your calculation was made on that basis, was it not? A. Yes, sir.

Q. That the coal which passed over the scales and went into the offshore bunkers was correctly weighed? A. Yes, sir.

Q. Does not that assumption include all coal that passed over the scales?

A. Why, not in every instance, no.

Q. Well, aside from these three or four instances that have been spoken of here does not that assumption include every ton and every pound of coal that passed over the scales?

A. No, sir; for the reason that we have some information as [484—429] to crooked weighing.

Q. Mr. Roche has called your attention to the discharge of several cargoes, where there was a short-

(Testimony of W. H. Tidwell.)

age; you have those in mind, have you not?

A. Yes, I have those in mind.

Q. The "Dumbarton" and the "Germanicus"?

A. Yes, as well as other matters.

Q. Where the settlement was made with the Government on the invoice weight, and not on the custom-house weight? A. That as well as other matters.

Q. Now I ask you, what other matters have you in mind and which you use in that assumption other than these three instances of the "Germanicus" and the "Dumbarton"?

Mr. ROCHE.—That is objected to, may it please your Honor, upon the ground that it is not proper cross-examination.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

I did not prepare Table C necessarily on the assumption that all of the coal that went into the offshore bunkers went into the Folsom Street offshore bunkers. I simply treated the bunkers as bunkers according to the record. I do not recall whether it said Folsom Street bunkers or Mission Street bunkers. I could not say for sure now, because I do not recall whether I could tell in any case where coal was charged as having gone into an offshore bunker, whether the reference was to Folsom Street bunkers, or the Mission Street bunkers, or the Howard Street bunkers, or the Green Street bunkers, or the Vallejo Street bunkers. I do not know the situation with reference to any of those bunkers, [485—430] except the Folsom Street bunkers. I am not familiar with the docks other than Folsom Street, so I could

(Testimony of W. H. Tidwell.)

not say whether the Government weigher at all the wharves at which coal was discharged could see the entire operation. I never made any investigation to determine what the conditions were at the docks other than Folsom Street. I do not know what proportion of coal was discharged at other docks than Folsom Street, and for aught I know more than half the coal may have been discharged at other docks, though my information is that the greater part of it was discharged at Folsom Street.

Q. When you first arrived at the overage in this case what was it, in your opinion?

The COURT.—You mean in amount.

Mr. McCUTCHEN.—In amount, yes, your Honor.

A. About 58,000 and some odd tons, I don't recall the exact amount.

Q. Do you remember a conversation with Mr. Norcross in which you told Mr. Norcross that his overage was too great and that the overage was not more than 39,000 tons? A. No, sir.

Q. Did you ever have any conversation with Mr. Norcross on that subject? A. I did.

Q. When and where did you have that conversation? A. In my office.

Q. What did you tell him in that conversation?

Mr. ROCHE.—I object to the question upon the ground that it is not proper cross-examination, and if put for the purpose of impeachment, the precise statement made by the witness to Norcross must be set forth, together with the time, place, circumstances and parties present. [486—431]

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—We are not asking it for that purpose now. We may want to fix those circumstances a little more definitely later on. But it seems to me that this is cross-examination. If the witness now says that the overage is 61,000 tons, and he said at a previous time that it was only 39,000 tons, it seems to me that we have the right to develop that upon his cross-examination.

A. I did not say it was 39,000 tons.

Mr. McCUTCHEN.—I say, if you did.

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—Q. What did you say it was?

A. About 58,000.

Q. When did you have that conversation with Mr. Norcross? A. The date I do not remember.

Q. Did you ever say to Mr. Norcross that the overage was not more than 39,000 tons? A. No.

Q. Did you ever put it below 59,000 tons?

A. Yes.

Q. Or below 58,000 tons? A. No, sir.

Q. After having had your first conversation with Mr. Norcross with reference to overage, did you at a subsequent conversation with him state that the overage was 50,000 tons and that you had raised your figures from 39,000 to 50,000? A. I did not.

Q. You have stated that your first figures were 58,000 tons? A. Approximately.

Q. Approximately 58,000, and that you never thought the overage was less than 58,000, or approximately 58,000?

* * * * *

A. No, sir. The amounts 58,000 to 61,000 was

(Testimony of W. H. Tidwell.)

raised on account of certain [487—432] comparisons and checking off certain errors between Mr. Norcross and myself; I found some errors in the figures he had given me, and there were some amounts added to and stricken off of the report, which then showed an overage of 61,000.

Mr. McCUTCHEN.—Q. Is it not a fact that when you first arrived at a figure which you thought represented the overage, that that figure was in the neighborhood of 39,000 tons? A. No, sir.

Q. Is it not a fact that after subsequent investigation you concluded that the overage was greater, but that it did not exceed approximately 50,000 tons, and you so stated to Mr. Norcross?

A. 58,000 is my remembrance of it, approximately 58,000.

Q. Will you state positively now that you did not tell Mr. Norcross that the overage did not exceed 50,000 tons? A. Yes, sir.

My title with the Government service is Special Agent of the Treasury Department. The duties of that position are generally the checking of the records of the custom-house, looking after the administration of customs, the values of goods, as well as the question of all frauds on the Government so far as customs are concerned. I began my investigation in this particular case in August or September, 1912.

Q. At or about that time, or at any time subsequent to that date, did you make any arrangement with any of the newspapers by which you were to

(Testimony of W. H. Tidwell.)

supply them with information which you might acquire in the course of your investigation?

A. I did not.

Q. At or about the time that these indictments were returned, [488—433] or at any time from the time when you began your investigations, did you make any arrangement by which you were to supply information to any of the newspapers with reference to the facts of this case? A. I did not.

Q. Did you ever have any conversation with the representative of any newspaper in San Francisco with reference to supplying or furnishing to that newspaper information regarding the facts of this case? A. I did not.

Q. You did not have any arrangement or understanding of that nature or character?

A. None whatever.

Mr. ROCHE.—Q. Either directly or indirectly?

A. Either directly or indirectly. And I would like to have you produce the witnesses to that effect.

Mr. McCUTCHEN.—Q. While you were making this investigation and while you had access to the books and records of the Western Fuel Company, did you supply information obtained by you in that confidential relation to the newspapers of San Francisco? A. I did not.

Q. To any newspaper? A. No, sir.

Q. When you say that you did not supply information of that nature to any newspaper, do you wish to be understood as saying that you did not supply it to any person who was to convey it to a news-

(Testimony of W. H. Tidwell.)

paper, or to any newspaper? A. I do.

Q. And when you say that you did not supply any such information to any newspaper, do you mean to be understood as saying that you did not supply it directly or indirectly to any newspaper?

A. I mean to be understood that I had absolutely nothing to do with the supplying of information to any newspaper, either directly, indirectly or otherwise. [489—434]

Q. And that you never had any understanding that you would supply information which came to you during this investigation?

A. I think my last answer answers that.

* * * * * * *

Mr. McCUTCHEN.—Q. Did you not furnish to some person to be by him furnished and supplied to one of the newspapers in San Francisco a copy of a report made by the United States Attorney for this district to the Attorney General at Washington concerning this case? A. No, sir.

Q. Oh, by the way, will you produce one of those San Diego entries, please. You have them all here, have you not?

A. If you will state which one you would like to see I can get it for you.

Q. Any one of them.

Mr. ROCHE.—What particular number do you want?

Mr. McCUTCHEN.—Look at page 1 of your Exhibit “A,” take the “Reidar,” for instance.

The WITNESS.—That would be during the

(Testimony of W. H. Tidwell.)

month of May. May, 1906. You won't find those San Diego entries for that particular date, they were burned up to 1909, they were destroyed; I think it was 1909.

Mr. NORCROSS.—Look for the San Diego entry No. 225.

Mr. ROCHE.—Suppose you take it for 1910.

Mr. McCUTCHEN.—I have it here.

Q. I call your attention to the entry of the cargo of the steamship "Thor," the invoice being dated the 7th of January, 1910, and ask you if you will state when the entry was made. You are more familiar with that than I am.

A. The entry seems to have been sworn to on January 17, 1910, and the deposit of the duty was made on the same date. [490—435]

Q. Was there afterwards the return of any duty on that transaction? A. Yes, 31.46. .

Q. To whom was that returned?

A. Evidently to the importers of the coal.

Q. That is, to J. D. Spreckels & Brothers?

A. The Spreckels Brothers Commercial Company.

Q. It was not returned to the Western Fuel Company, was it? A. No, sir.

Mr. McCUTCHEN.—I suppose it will be admitted, Mr. Roche, that this is a sample of all of the entries made on that San Diego coal.

Mr. ROCHE.—Subject to correction, yes. I assume that to be correct.

Mr. McCUTCHEN.—The amount of duty deposited was larger than when the duty was finally ascer-

(Testimony of W. H. Tidwell.)

tained and there was a rebate paid.

Mr. ROCHE.—But there was no drawback—

Mr. McCUTCHEEN.—No.

Mr. ROCHE.—I will assume that that is correct. Subject to correction, I will assume now that it is correct.

Mr. McCUTCHEEN.—Q. Mr. Tidwell, will you give me the date of a cargo that was discharged in 1907 on which there was a shortage? I want to get the corresponding entry in this record,—say, between August 1st, 1907, and March 31, 1908.

A. Here is one in August, the steamer “Tellus.”

Q. What date in August is that?

A. I cannot tell you the date without referring to the entry.

Q. I have the entry of the “Tellus” here. It is entered here on August 5th. Will you look at this record which is indorsed, “Weigher’s record, Surveyor’s Office, Custom House, August 1, [491—436] 1907, to March 31, 1908”; look at the entry of the “Tellus” under date of August 5th. Here it is on this tabulation in the month of July; it is under the month of July in your Table A. (Addressing Mr. Roche.) I don’t care to offer this book in evidence, Mr. Roche, or to offer all of these books; I want to offer this record as a sample of the entries that were made in the custom-house book.

Mr. ROCHE.—Very well, you don’t have to offer the book.

Mr. McCUTCHEEN.—Q. Will you read that, please, Mr. Tidwell?

(Testimony of W. H. Tidwell.)

A. Do you want the numbers and everything?

Q. Yes, or I think perhaps I can read it. I think we will be able to abbreviate this, with the consent of counsel. Let me read it and you can watch me while I am reading it so as to see that I read it correctly. I think that counsel will agree to this. In a column, at the head of which is "Number" are the figures "11,942." Under the column for the date is 5th, August being at the head of the column. I understand that to mean the 5th of August. Under the name of the vessel is the word "Tellus." Under the column headed "From whence arrived" is the name "Ladysmith." Under the column "To whom consigned as per permit" are the words "Western Fuel Company." In the column at the head of which are the words "Packages, contents and quality" is "3630 tons of coal." Then in brackets immediately following the word "Coal" is the following: "Short 88, 2080 2240ths tons," which means 88 tons, 2080 lbs. Is that correct? A. Yes, sir.

Q. This is a sample of the entry which you said this morning was made upon the discharge of each cargo, and within a month at least of the time when the cargo was discharged? [492—437]

A. It should be made within that time; that would be a representative entry of all of them.

Q. Now, the fact is, is it not, that these records are kept from day to day, and instead of this being made within a month it is made from day to day?

A. Yes, but I know when it was made, but I understand that it should be made that way.

(Testimony of W. H. Tidwell.)

Q. I understand your answer, Mr. Tidwell, because you don't know about this particular entry; that is what you mean, is it? A. Yes, sir.

Mr. McCUTCHEN.—I will show this to the jury. This is the number of the entry; this is the date; this is the name of the ship; this is the place from which the cargo came; this is the consignee; this is the number of tons in the cargo; and in brackets is the shortage in that particular cargo.

Q. Now, Mr. Tidwell, that is the sort of a record that was made in the custom-house every time a short cargo arrived here?

A. A short or over or otherwise.

Q. We are dealing now with short cargoes. That is the sort of an entry that was made every time a short cargo arrived?

A. Yes, that was the usual entry.

Q. Well, that was the invariable entry, was it not? Not the usual entry, but it was the invariable entry, was it not? A. Yes, I should say that it was.

BE IT REMEMBERED that thereupon the following testimony was given and the following proceedings were had:

Mr. STANLEY MOORE.—If your Honor please, we would like to ask the witness just a few questions in order to lay a definite record in regard to a certain matter as to which he has been [493—438] questioned.

Q. Mr. Tidwell, do you recollect upon what date it was that the company turned over the books to

(Testimony of W. H. Tidwell.)

yourself and to your assistant back in February of this year?

A. No, I do not recall the exact date, but I do recall, or at least I think I am correct in this as to the exact date, that the company was subpoenaed to appear before the Grand Jury to produce its records on the 7th of February. That is my best remembrance of the date at the present time, and that soon after that, a few days afterwards, the records were turned over, that is, certain records were turned over.

Q. Had any demand been made upon the company previous to the service of this subpoena?

A. No, sir.

Q. Do you remember whether after the subpoena was served upon the company, and within a day or so, Mr. Norcross or Mr. Olney or Mr. Howard informed you, or the members of the Grand Jury, or the United States District Attorney, that you were welcome to look at the books?

Mr. ROCHE.—That question is objected to as not proper cross-examination.

Mr. STANLEY MOORE.—It goes to fix a date, your Honor. There has been some suggestion here in regard to the books during the direct examination, and the suggestion it seems to me has been thrown out by the witness during the cross-examination that there was nothing voluntary about the original production of these books. In view of that I simply wanted to develop the fact so that the witness could judge as to the correctness of that statement. It goes to fix the date with reference to this other mat-

(Testimony of W. H. Tidwell.)

ter that I desire to lay the foundation for. [494—
439]

Mr. ROCHE.—Counsel can by a direct question put to the witness, bring out that matter. He can put a direct question to the witness for the purpose of ascertaining or having him fix the precise date upon which the particular transaction which he has in mind occurred; but he has no right for that purpose to attempt to elicit from the witness conversations which took place between himself and various other parties. The only purpose for which this examination was permitted this morning, or for which it was pursued, was for the purpose of showing animus, or rather, it was so claimed because the witness at a certain time made a certain request of one of the Government officials with reference to certain Government documents. That matter was fully developed this morning and was fully investigated as the result of the questions put to the witness. This should not be permitted now under the guise of cross-examination.

Mr. STANLEY MOORE.—I think I would have the right to go into the question of the original production of the books at any event in view of some of the assertions and statements made by the witness during the course of his examination, and by Mr. Roche as well during the course of the objections, which objections have been interlarded with statements as to the facts concerning these matters. I simply wanted to develop the fact from the witness in regard to the production of the books. And inci-

(Testimony of W. H. Tidwell.)

dentially, I want to also fix a certain date with respect to the appearance of certain newspaper articles.

The COURT.—The objection is overruled.

Q. The date which I will fix is February 7th—and I think that is correct, on that date Mr. Norcross and the defendant Howard appeared in answer to a subpoena and brought two or three records; one was a book kept by the defendant Mills; [495—440] another was a discharge sheet—those yellow discharge sheets, and another was a large book which is also in evidence here, I don't know how to describe it exactly. At that time both Mr. Howard and Mr. Norcross, as I remember it, stated that we could have their books to go into whenever we saw proper. A few days later, probably the next day, I don't know exactly, Mr. Norcross and I had a conversation and certain records were then delivered.

Mr. STANLEY MOORE.—Q. Well, is it not a fact that they also stated to you at that time that you could go down there, together with any persons whom you might designate to assist you in the examination, and examine the books and records of the company, down in the office of the Western Fuel Company?

Mr. ROCHE.—That is objected to, if your Honor please, upon the same grounds.

The COURT.—That does not fix any date.

Mr. STANLEY MOORE.—Q. Well, do you recall anything further having been said in that connection, Mr. Tidwell, other than what you have already testified to?

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—That is objected to upon the same grounds.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

Q. Then I will ask you this question, Mr. Tidwell: How soon after February 7th, if it was February 7th, did you go down to the offices of the Western Fuel Company for the purpose of making an examination there of its books and papers?

Mr. ROCHE.—The same objection, and upon the further ground that the witness has been already interrogated in relation to this subject matter.

The COURT.—The objection is overruled. [496—441]

A. I think it was only two or three days; it might possibly have been the next day. I don't recall the exact time. Within a day or two I will say.

Mr. STANLEY MOORE.—Q. It was within a day or two of February 7th, if that was the date?

A. Yes, I should say so.

Q. Or on February 6th, if that was the date. Now, Mr. Tidwell, I want to ask you this further question: Do you recall any newspaper articles appearing with respect to this matter until after you had secured access to the books and papers of the Western Fuel Company?

Mr. ROCHE.—That is objected to upon the ground that it is not proper cross-examination; and upon the further ground that counsel is now endeavoring to inject into this record matters—

The COURT.—The objection is sustained.

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—If your Honor please, I wish it for the purpose of laying a record for subsequent testimony. That is all.

Q. Then, Mr. Tidwell, do you recall an article appearing in the “San Francisco Bulletin” the day after you commenced this examination of the books and papers of the Western Fuel Company concerning these books and papers?

Mr. ROCHE.—The same objection.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

Q. I will ask you this further question: Do you recall, Mr. Tidwell, a further article appearing in the “San Francisco Bulletin” on the day after that, and to the effect that the books of the company— [497—442]

Mr. ROCHE.—(Intg.) Just one minute. I object, may it please your Honor, in view of your Honor’s ruling, to counsel pursuing this line of examination or putting these questions to the witness as counsel knows that the witness will not be permitted to testify.

Mr. STANLEY MOORE.—Your Honor, this is the point that is in our minds; this witness has stated that directly or indirectly he never entered into any arrangement with any newspaper looking toward publicity with respect to this matter, or gave out any articles or newspaper items concerning the same; now, that is a statement that we want no mistake in this record concerning, and—

The COURT.—There is no mistake about it, he

(Testimony of W. H. Tidwell.)

was quite positive about it.

Mr. STANLEY MOORE.—Yes, your Honor, and we want it so he will have to continue to remain quite positive about it; in other words, we want to make the record full and specific in that regard, and that is all.

The COURT.—It is quite full enough.

The WITNESS.—I will here repeat the same answer, if that is satisfactory.

Redirect Examination by Mr. ROCHE.

Upon the first occasion to which I referred during my cross-examination, and when certain books, papers and documents of the Western Fuel Company were turned over to me, I did not receive all of such books, papers and documents as had bearing upon this inquiry. It was sometime prior to June 24th, 1913, that the Western Fuel Company refused to give me permission to examine any book, paper or document in its possession relating [498—443] to the subject matter of this controversy. That date, June 24th, 1913, I have fixed as the date when I objected to the collector of customs permitting the Western Fuel Company to look at certain records in the custom-house. I am satisfied that it was before this date that the Western Fuel Company had declined and refused to permit me or any other Government official to examine any one of those papers, documents, vouchers or books in its possession, or under its control. So that my request that the Western Fuel Company be denied access to these custom-house records was made subsequent to the Western Fuel

(Testimony of W. H. Tidwell.)

Company's refusal to give me their documents. subsequent to the date I have given, and prior to the date of the trial of this case, the Government officials or some of the Government attorneys attempted to obtain possession of some of the books, papers and documents in the possession of the Western Fuel Company, which in their opinion related to the matters here being investigated. A subpoena was served upon the officers of the Western Fuel Company in this connection, on August 11th, if I am not mistaken, and another about August 14th. I think there were three such subpoenas in all requiring the Western Fuel Company to produce certain records, papers and documents and vouchers before the Federal Grand Jury. The Western Fuel Company refused to comply with the demand.

I testified in response to questions put to me by counsel for the defendants that there were about 41,000 tons of excess coal or excess tonnage of coal sold by the Western Fuel Company between April, 1906, and December 31, 1912, if, instead of taking into consideration the coal received as disclosed by the records of the Western Fuel Company, I were to take into consideration the invoice weights of the cargoes of the imported coal. That, of course, took into consideration likewise the partial cargoes concerning which I have heretofore testified. The 41,000 tons of excess coal sold by the Western Fuel Company between April 1, 1906, and December 31, 1912, was excess tonnage based upon and taking into consideration overage and invoice weights of imported coal.

(Testimony of W. H. Tidwell.)

I also testified that this excess of coal sold by the Western Fuel Company based upon the invoice weights should be about 1.8 per cent; [499—444] that calculation being based upon the assumption that the invoice weight would represent the true weight of coal imported into the harbor, and not the ascertained weight, or the weight upon which the Western Fuel Company paid duty to the Government. If it be true that the invoice weights represent in fact the true and actual weights of the cargoes of imported coal brought into the State of California by the Western Fuel Company, it would then necessarily follow that the Western Fuel Company failed to pay the United States Government duty upon the coal representing the difference between the invoice weight and the ascertained weight.

Q. In answer to a question put to you by Mr. McCutchen just before Court adjourned, and to which your attention was again directed after Court convened this afternoon, you did say that the shortages were based upon the difference between the invoice weights and the ascertained weights, and the overages—so far as the barges were concerned—were based upon out-turn weights,—that is, from the off-shore bunker, which represents ascertained weights and discharged weights.

A. The difference between the entered weight and the discharged weight.

Q. Is there any inconsistency in that calculation?

A. I don't think so.

Q. You say that there is no inconsistency in that

(Testimony of W. H. Tidwell.)

position. Will you explain why?

A. For the reason that the coal in-coming is given an invoice weight at the mines, and after it arrives here a considerable quantity of the coal is alleged to have been placed in the bunkers without ever being weighed, consequently that would cause a shortage in weight over the invoiced weight; whereas the coal which actually goes over the scales and is then transferred in [500—445] cars which have been weighed to the offshore bunkers and then goes into the barges, every pound of which coal is accurately weighed; the coal going out of the barges into the vessels in nearly all instances showed an overage.

Q. During the examination which you made of the books and records and papers of the Western Fuel Company, did you at any time ascertain that any coal had been deposited or dumped into the offshore bunker, or into any of the pockets of the offshore bunker, which had not gone over the scales, and which had not been weighed?

Mr. McCUTCHEN.—We object to that, if your Honor please, as calling for hearsay evidence.

Mr. ROCHE.—I am asking him for his knowledge, based upon the records which are in evidence.

Mr. McCUTCHEN.—You mean from the records, do you, Mr. Roche?

Mr. ROCHE.—Yes, certainly.

Mr. McCUTCHEN.—Then I withdraw the objection.

A. The records would indicate in every instance that coal had been weighed; it was even shown to the

(Testimony of W. H. Tidwell.)

pound. In some instances I think it is down as low as 40 pounds; so many tons 40 pounds, as being the weight of the coal going into a barge. In every instance, it would show the exact amount.

Mr. ROCHE.—That is, the exact weight of coal checked into the barge?

A. Yes, sir, even to the pound.

The daily discharge record or records heretofore introduced in evidence are, according to my understanding, samples of the daily discharge records kept by the Western Fuel Company, [501—446] some of which were examined by me. It is true that each one of those daily discharge records, or at least each one of those which I examined, disclosed the exact place where the coal unloaded from the steamship was distributed; and so far as the offshore bunkers were concerned, these daily records or charts disclose the quantity of coal deposited into that offshore bunker, and into its pockets, after said coal had come off the scales and at the ascertained weight, and it is upon that ascertained weight that the duties are paid to the United States Government. I do not think that it would be possible from the records kept by the Western Fuel Company or any of its officers to determine what proportion of the invoice weight ought to be checked up against the offshore bunker or any of its pockets, or against any of the barges, for the simple reason that in distributing the coal throughout the various compartments, bunkers, yards, etc., no consideration is taken of the invoice weight at all, but only of the amount of coal which is

(Testimony of W. H. Tidwell.)

weighed out of the ship.

Recross-examination by Mr. McCUTCHEN.

I have just stated on redirect examination that the coal that came into the offshore pockets was accurately weighed. The coal which went into the inshore bunker was not, so far as my knowledge goes, weighed in any different manner, in so far as it was weighed at all, from the coal that went into the offshore bunker. That is to say, my understanding is that the coal which went into the offshore bunker was weighed on the same scales as the coal which went into the inshore bunker. I have said that the coal which went into the offshore bunker was correctly weighed. The scale was not manipulated in [502—447] reference to that coal, so far as I know. The coal destined for the inshore bunker, which actually went on the scales, was weighed in the same manner as that which was destined for the offshore bunkers. My information is, and I have so stated on redirect examination, that every pound of coal that went into the offshore bunker was accurately weighed.

Q. Now, is it not also the fact that every pound of coal which was weighed was accurately weighed?

* * * * *

A. I am only testifying in so far as the record is concerned. I have no personal knowledge of the weighing of the coal.

Mr. McCUTCHEN.—Q. Then do we understand that all you know about it is what you found in these records?

A. Yes. I have been told some other things, but

(Testimony of W. H. Tidwell.)

I don't suppose you want that.

The COURT.—Well, the question is, that that is all that you have been testifying to?

A. Yes, that is all I have been testifying to, to the records, right straight through.

Mr. McCUTCHEN.—Q. In making up your exhibits, you acted, then, on the assumption, did you, that all of the coal which was weighed and which went into the offshore pockets, was accurately weighed? A. I did.

Q. In making up your exhibits, did you also act upon the assumption that all coal which went into the inshore bunkers and which was actually weighed, was accurately weighed? A. I did.

Q. In making up these exhibits, then, you did so upon the assumption that the weighing operation in each and every instance, [503—448] whether the coal was discharged into the offshore bunkers or into the inshore bunkers, was honestly conducted?

A. I accepted each weight as it appeared.

In answer to the question put to me by counsel for the Government, I gave the percentage of overages on the barge deliveries. Among those percentages was one of 70 per cent, which I afterward reduced to 21 per cent. The figure 70 per cent was incorrect, in so far as Mr. Mills' books were concerned. My statement was correct; Mr. Mills' books were incorrect in that particular instance. Whether Mr. Mills' books were incorrect in every other case where I gave a percentage, I could not answer. I should say that the total out-turn was incorrect. I did not check up

(Testimony of W. H. Tidwell.)

the other percentages which I have given by going back over the records and checking up from the first time a ton of coal was placed in a barge up to the very end, as I did yesterday. There is no other way of getting at the percentage of overage except as shown by the record and by Mr. Mills. I assumed that the figures of Mr. Mills in the books were correct, and I acted accordingly. In the case of the 70 per cent overage I found that these figures were incorrect, and I made the correction. I did not check the figures up in the other cases to find whether they were correct or incorrect. The average was 519 tons in that instance, but it was on a larger amount laden into the barge than his second shows. It would be impossible between now and the next session of Court to go into all the figures and see whether the percentages I have given are correct, or not. It would likewise be almost impossible to go through the entire list and see whether my conclusion is correct in any one case. If you will point out any particular one I will be [504—449] very glad to check it up.

Further Redirect Examination by Mr. ROCHE.

I remember producing here at an earlier stage of this trial an enlargement of the books of the defendant Mills relating to the discharge of the steamship "Thor." That enlarged representation corresponded in every detail with the figures contained in the books of the defendant Mills.

Further Recross-examination by Mr. McCUTCHEN.

In arriving at my percentage of overage on the barges I did not take into consideration the times

(Testimony of W. H. Tidwell.)

when there was either an under-run or shortages. The shortages on barge deliveries were eliminated. No shortages are shown on Exhibit "C" at all. It represents the overrun of the barges by Mr. Mills. It does not purport to be a duplication of Mr. Mills' books. Where there was a shortage the Government lost nothing in drawbacks. The reason why I should not in a case, for instance where it appeared—to take a hypothetical question—that a barge ran 100 tons short and another ran 100 tons over, take into consideration the shortage of 100 tons for the purpose of determining the gross overage, is that the company in its claim for drawback would claim only whatever coal was laden on the ship. Wherever I have found an overage I have taken that as evidence that the company delivered more coal than was turned into the barges.

Q. And you don't think it is proper, for the purpose of determining the gross percentage, to take into consideration the total delivered to the barges, and the total delivered out of the barges? [505—450]

A. That, the Government has nothing to do with. We are not interested in anything of that character, for the reason that we only pay drawback on what is actually laden on the vessel, as shown by the records.

Q. Do you mean to say you can get the total overage in any other way than the way I have indicated?

A. That would be the only way to get the total overage, yes, sir; then our percentage, I should say, would be greater, because there were so few of the shortages,

(Testimony of W. H. Tidwell.)

that it would almost hardly be considered.

Q. What do you mean by saying the percentage would be greater; how could it possibly be greater?

A. For the reason that there would be more tonnage to handle.

Q. It would be a lesser percentage, would it not, instead of a greater one? A. No, sir.

Q. Is that the sort of arithmetic you have been giving us while you have been on the stand?

A. I think it is very good.

Q. You have not taken into consideration, for the purpose of determining the percentage, the overage on barge deliveries—

A. (Intg.) I have not considered the shortages at all.

Q. Now, I ask you if, as a man who is familiar with figures, as you say you are, you can determine the percentage of overage on barge deliveries, unless you charge the barge with every pound of coal received and credit it with every pound of coal delivered?

A. No, sir, you cannot.

Q. Then your method does not correctly show the percentage of overages, does it? A. It does.

Q. Let us assume, now, that we have ten barges, and that they are going to the offshore bunkers from day to day, getting coal, [506—451] and that they are then going to ships out in the offing from day to day delivering coal, is there any way known to arithmetic or science—I don't care what the science may be—by which you can determine the percentage of overages on such deliveries, unless you

(Testimony of W. H. Tidwell.)

put to one side all the coal that was delivered to the barges and to the other side all the coal that was delivered by the barges. Now, answer that question, will you, and then you can make any explanation you desire.

A. Yes, I will be very pleased to. An actual percentage, no. The Government is not interested at the present time in shortages; it is only interested in overages upon which it has paid money illegally.

Q. Suppose, Mr. Tidwell, by way of illustration, that the shortages were greater than the overages, would you still say that the percentage of overage was as great as you show in your statement?

A. No, sir.

Q. You would not? A. No, sir.

Q. Then the shortages have something to do with the determination of the overages?

A. It has nothing to do with this statement whatever.

The COURT.—I understand he is only dealing with such coal as was delivered to vessels where rebates have been claimed, and on vessels of the United States Government.

Mr. McCUTCHEN.—That is what we are talking about, your Honor. I suggest this, to your Honor—it probably would occur to your Honor, and I think it would occur to me; if I find shortage and overage in one case, and an overage in another, that there probably had not been correct weighing.

A. I think I have answered the question by saying that if you are trying to arrive at an exact percent-

(Testimony of W. H. Tidwell.)

age, then they should be [507—452] taken into consideration; but they have not been taken into consideration in this statement, because we were not concerned with them, and the percentage which is shown, of 6 per cent, refers only to overages, and not to shortages.

Q. Exactly, and that is not a correct showing of the gross overages, is it?

A. You mean a percentage of gross overages?

Q. Yes. A. No, sir.

Q. And not only is it not a correct showing of the percentage of overages, but it is not a correct showing of actual overage, is it, of the barge deliveries.

A. Yes, sir.

Q. Suppose there was no drawback involved here at all, Mr. Tidwell—

A. (Intg.) I will explain that. For instance, suppose a barge had 1,000 tons put on her and she checked out 995 tons, or 990 tons, the Government would only pay drawback on 990 tons, and not on 1,000 tons; the consequence is that the Government would have no interest at all in whether that checked short. On the other hand, if a barge takes on 1,000 tons and checks out 1,200 tons, the Government has evidently been defrauded out of the duty on 200 tons, and we have taken that into consideration in this particular statement.

Q. I will put the question to you again. Suppose that on one side it appeared that the barges had been charged with 10,000 tons of coal, and upon the other side it appeared that in the aggregate the barges had

(Testimony of W. H. Tidwell.)

delivered 10,000 tons of coal, but that when you came to deal with individual transactions, you found an overage in some cases and a shortage in other cases, do you mean to say that both the shortages and the overages should not be taken into consideration for the purpose of determining [508—453] whether the barges had delivered more coal than they had received?

A. We would only take into consideration the overages, in which the Government was concerned, and not the shortages.

Q. Well, then, if a given barge had received a given quantity of coal, and she had appeared to have delivered less coal to a drawback steamer than she had received, and still seemed to be empty, you would not take that into consideration in determining the percentage of overage, would you? Is that the method which you have pursued?

A. You mean the general percentage?

Q. Yes.

A. Yes, but I would not treat with the barge at all, just as I have not done here in this statement.

Q. Have you not treated with the barge in every case, here? A. Not one that was short.

Q. Not one that was short? A. No.

Q. Why?

A. Because we are not interested in it.

Q. Why, if one of these barges with which you have not treated, as you say, appears to have delivered to a steamer less coal than it received from the offshore bunker, but is still empty, why would you not take

(Testimony of W. H. Tidwell.)

that into consideration in determining the overage?

A. Because it would be very apparent there that the Government had not overpaid in drawback.

Q. Would it also be very apparent that a mistake had been made which should be rectified somewhere?

A. Yes, but the Government could not rectify it, because they only had made claim for a certain amount.

Q. But could not you have rectified it here in making this statement? [509—454]

A. We knew nothing about it until after we took possession of the books.

Q. Don't you think that a man who had possession of the books and who was inclined to make a fair showing as to the contents of the books for the purpose of informing the Court and jury what the overage had been, would have taken those shortages into consideration? A. No, sir.

Q. You don't think he would?

A. No, sir, for the reason that the man who obtained the coal makes his application. We have nothing to do with making the application, we pass on the applications after they are filed.

Q. I will put it to you in another way: We will assume that there were taken out of the offshore bunkers 10,000 tons of coal and that there were delivered from the barges 10,000 tons of coal; that the charges on one side balance the charges on the other, but we will assume that in some of these cases there was a shortage and in some of them there was an overage, but that the transactions, taken as a whole,

(Testimony of W. H. Tidwell.)

balanced one another. Have you proceeded on the theory that in such a case, if there happened to be an overage, you would charge it as a fraudulent overage, and if there happened to be a shortage, you would say that the Government had no interest in it?

A. Exactly.

Q. And you think that is an honest way of dealing with the transaction?

A. Yes, sir; because, as I said before, we have no interest in the shortages, whatever. We pay the amount of the claim, and nothing else. [510—455]

* * * * *

Mr. McCUTCHEN.—Q. Mr. Tidwell, will you turn to your “Exhibit C,” using the books of Mr. Mills for this purpose if you desire, and let us know what you stated the percentage to be on the barge “Comanche” on her receipt and deliveries of coal beginning June 26, 1908, and ending July 20th of the same year—I mean ending September 5th of the same year?

Mr. ROCHE.—You understand, the table does not show when the barge commenced to take on coal.

Mr. McCUTCHEN.—The diary of Mr. Mills from which the table was prepared shows that.

Mr. ROCHE.—I understand this.

Mr. McCUTCHEN.—This is one of the cases in which the witness gave a percentage of overage.

Mr. ROCHE.—I simply want the record to show that the table to which the witness’ attention is now being directed simply shows the date of clearance and

(Testimony of W. H. Tidwell.)

not the date upon which coal was first taken into or laden upon the barge.

Mr. McCUTCHEN.—I told him to use the record of Mr. Mills in connection with his Table C or use the record of Mr. Mills alone, if he desired.

Referring to the barge “Comanche,” under date September 11th, the witness then continues:

Q. What did you state the percentage of overage to be on that transaction of delivery?

A. It appears to be about 10 per cent.

Q. It appears to be about 10 per cent. A. Yes.

Q. Well, now, will you state the figures on which you made the [511—456] statement it was approximately 10 per cent?

A. Received 1131 tons into the barge, an overage of 111 tons, without stating the lbs.

Q. Do you know whether that delivery represented all of the coal that went into the barge for the purpose of determining that overage?

A. Only as shown by the record of Mr. Mills' books.

Q. Could not you have ascertained exactly what went into the barge on that occasion or during those deliveries just as you did in the case of a larger percentage which you subsequently corrected?

A. Had every barge been checked from the time the first lb. went into her until it was discharged.

Q. Can you determine the percentage in any other way than that?

A. We accepted Mr. Mills' books as being correct and accepted the amount which was shown in those books as having been put into the barge.

(Testimony of W. H. Tidwell.)

Q. If you did not take the account or you did not take the entries in Mr. Mills' books for the purpose of showing all of the coal that was delivered to a barge, what do you mean by saying that you accepted Mr. Mills' books as correct?

A. Just exactly what I said.

Q. What is that? A. Just exactly what I said.

Q. If you did not take those things into account, you could not get a percentage, could you?

A. We did not figure up all of Mr. Mills' books to see whether he made any errors or not; we simply used his totals.

Q. I am not speaking of an error. Did you say there was an error in the case when you went into details yesterday and [512—457] arrived at a percentage? A. I did.

Q. What was the error?

A. In Mr. Mills not carrying forward, as he usually did, the total.

Q. Aren't there any number of cases where he did not carry forward the total?

A. That is the only one I know of.

Q. You have not examined any of these others?

A. No.

Q. Isn't it a fact that this is the only case, that is the one you detailed on the stand yesterday—is that the single, only case where you took off the figures showing the coal that went into the barge and the coal that went out of the barge for the purpose of determining the percentage?

A. You mean figuring it up?

(Testimony of W. H. Tidwell.)

Q. Yes.

A. Yes, except a few days ago when we were showing the discharge of the "Thor."

Q. That is to say, in only two cases?

A. There were two or three barges in that instance.

Q. In only two or three cases where coal was delivered to barges and discharged from barges did you attempt to determine the total deliveries to barges and the total deliveries from the barges?

A. No; I accepted the totals as shown by the books.

Q. You know that these totals don't show the detail deliveries, do you not?

A. Yes, they do not—wait a minute; they do not show the details—yes, they do show the detail deliveries.

Q. Then what do you mean by saying that you did not take the detail deliveries to the barges into consideration? [513—458]

A. Well, I referred then to the detail deliveries out of the barges. It also shows the detail deliveries into the barges for this case here, for instance—it shows that the barge "Comanche" received from the "Titania" 92 tons and odd lbs.; offshore bunker, 71 tons, 30 lbs.; offshore bunker, 131 tons, 240 lbs.; offshore bunker 114 tons, 2170 lbs.; offshore bunker 39 tons, 1860 lbs.; offshore bunker 39 tons, 1630 lbs.; from the "Torgenskjold" 662 tons, 930 lbs., or a total of 1131 tons, 412 lbs.

Q. A total of what? A. 1131 tons, 412 lbs.

Q. That is the total received upon which you derived this percentage? A. Yes.

(Testimony of W. H. Tidwell.)

Q. Well, now, isn't it a fact that the total received on that occasion was 3666 tons?

A. I know of no such figure.

Q. You don't know of any such figure? A. No.

Q. Will you attempt to say that was not the total received?

A. I could not answer it at all because I don't know.

Q. Then why have you undertaken to state percentages if you don't know anything about the figures?

A. I do know something about them. Mr. Mills' books show there was 1131 tons received into the barge.

Q. It shows there was 1131 tons received into the barge taking into consideration a balance that was on hand at a certain time, isn't that true?

A. There is no balance shown here at all.

Q. There is no balance shown there at all. Will you look at the record of Mr. Mills with reference to that transaction and see whether there is not a balance shown? [514—459] A. Yes.

Q. Before you answer that one: Do you draw a distinction between a case where a balance was carried forward and a case where there was a balance and that balance not carried forward?

A. I prefer to answer the other question first.

Q. Will you answer that question?

A. There is no balance shown here on the "Comanche" on December 11th.

Q. Now get the diary and the figures and see

(Testimony of W. H. Tidwell.)

whether according to the coal with which the barge was charged and the deliveries with which it was credited there was not in fact a balance on the barge at that time?

A. Well, it shows it had received 1131 tons, 412 lbs., and that it had discharged 1242 tons, 1991 lbs., an overage of 101 tons, 1579 lbs.

Mr. ROCHE.—Q. Is the overage specified in his handwriting? A. Yes.

Mr. McCUTCHEN.—Q. That is to say, the overage, but the percentage is not specified, is it?

A. Oh, no.

Q. You derived the percentage? A. Yes.

Q. Now, you are not prepared to say that the total deliveries to that barge for the purpose of determining that overage which you have just mentioned were not 3666 tons? A. I am not.

Q. You are not prepared to say that the total delivery for the purpose of determining that overage was not 3778 tons?

A. I am not. I simply accepted it as shown by the books.

Q. You would have no difficulty, would you, in going back to the original date on which that barge was loaded with coal [515—460] and following the loadings of coal on to the barge from that time until the overage was finally determined on?

A. I think not.

Q. You did not have any difficulty in doing that in the case where you went into the explanation, quite elaborately, yesterday? A. No.

(Testimony of W. H. Tidwell.)

Q. And that is the only way you know of by which you could determine an accurate percentage of overage; isn't it?

A. If you desire, Mr. McCutchen, we will be very glad to do that.

Q. Answer the question.

A. Read the question.

(Last question repeated by the Reporter.)

A. Yes, I think so; that should be the correct way. I would be very glad to do that for you if you would specify the cases.

Q. You made the statement that there was an overage of 22.6 per cent on the barge "Melrose," the deliveries to which began January 26, 1909, and the deliveries from which ended April 1, 1909?

A. That is the "Melrose," Mr. McCutchen.

Q. The "Melrose," yes?

A. Yes; the record of Mr. Mills shows that 881 tons, 459 lbs. had been laden on the barge, the coal being received from the steamship "Wellington," 191 tons, 149 lbs.; the "Titania," 107 tons, 1670 lbs.; the offshore bunker, 495 tons, 490 lbs.; offshore bunker, 87 tons, 410 lbs.; making a total, as before stated, and that she discharged into the steamship "China" 534 tons, 882 lbs.; the steamer "Manchuria" 546 tons, 1130 lbs., or a total of 1080 tons, 2014 lbs., or 199 tons, 1579 lbs. more [516—461] than had been laden into the vessel.

Q. Was there any coal on that barge on the—I withdraw that. What was the date on which you say the barge received those coals? A. I did not say.

(Testimony of W. H. Tidwell.)

Q. Do you mean to say that there was not any coal on the barge before the first of those deliveries was made to her? A. I do not.

Q. There might have been a great deal of coal on the barge at the time the first of those deliveries was made.

Mr. ROCHE.—Just a moment. That question is objected to, may it please the Court, upon the ground that it calls for the personal knowledge of the witness.

Mr. McCUTCHEN.—I will amend it by stating, according to Mr. Mills' records.

A. I would have to look at it.

Q. Do you mean to say that according to Mr. Mills' records there was no coal on the barge at that time?

A. I have not stated so.

Q. You have not. If you don't know that then your statement of a percentage is absolutely unreliable, isn't it?

A. No; the statement of percentage is based upon Mr. Mills' books.

Q. Haven't you just said that you don't know but that Mr. Mills' books show there was coal on the barge at that time?

A. I have not said any such thing, except on April 1st.

Q. Do you say there was no coal on the barge at the time the first of these deliveries was made according to Mr. Mills' books? A. I do not.

Mr. ROCHE.—Suppose you let him look at the books and [517—462] see if he can tell. These

(Testimony of W. H. Tidwell.)

statements were made a year and a half ago, or a year ago. You have the records in front of you, Mr. Tidwell.

Mr. McCUTCHEN.—Which statements do you mean were made a year ago?

Mr. ROCHE.—These statements were apparently made a year ago.

A. I did not trace the barges down anyway at that time, except—

Mr. McCUTCHEN.—Q. (Intg.) You were not concerned with tracing that down at that time when you were getting this percentage, were you?

A. As I said before, I accepted the totals of Mr. Mills' books as being correct.

Mr. ROCHE.—What was the date of the first delivery there, Mr. McCutchen?

Mr. McCUTCHEN.—January 26, 1909.

Mr. ROCHE.—Q. Will you look under date of January 26, 1909, and that may assist you in following it.

A. It is very difficult to follow those things without close application.

Mr. McCUTCHEN.—Q. You did not devote any very close application to these books for the purpose of determining any of these percentages?

A. I was not interested in percentages at that particular time; I was interested in the totals.

Q. You have just said, as I understood you, in order to determine these percentages, it requires very close application?

A. No, I didn't say any such thing.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—You will at least concede that the totals as shown by the witness' exhibit are the same as the totals [518—463] shown by Mr. Mills' books?

Mr. McCUTCHEN.—Oh, no, indeed we will not; that would be an admission of something that is not a fact.

A. On January 26 it shows offshore bunker account, for amount I believe it is—"Aust"—I presume that is Australia—14—1100, Melrose.

Q. What do you understand that to be?

A. I understand it to be 14 tons, 1100 lbs.

Q. Did you take that into consideration in determining the percentage of that overrun?

A. I took into consideration the totals as shown by the books.

Q. Did you take that delivery of 14 tons—

A. (Intg.) I never saw it—

Q. (Continuing.) —Into consideration in determining that percentage of overrun?

A. I never saw that particular entry before.

Q. Well, you didn't take it into consideration?

A. I don't know. It again shows on February 8th, the "Melrose" offshore bunker, 14—1100, which I understand to be tons and lbs.; the "Diamond Head" 992 tons, 400 lbs., a total of 1006 tons, 1500 lbs.

Q. Just a moment. You do not find any cleanup of that barge, do you, between the date of this delivery and the date on which you determined the overage? A. No, I have not seen any.

Q. Did you take these deliveries to the barge into

(Testimony of W. H. Tidwell.)

consideration in determining that percentage of overage? A. I could not tell you.

Q. Why are you in doubt about it?

A. Because I don't know; I never saw it before.

[519—464]

Q. Tell us now what figures you did take into consideration in determining the percentage of overage?

Mr. ROCHE.—That question is objected to, may it please the Court, upon the ground it has been asked and answered a half dozen times, the witness having testified that he took into consideration the totals as shown by the books and records kept by the defendant Mills which he assumes to be correct.

Mr. McCUTCHEN.—The witness has said that in one instance that he didn't know whether he took certain figures into consideration or not.

The COURT.—He means, if these figures were carried forward in the totals, as appears to have been done in many instances, then he took them into consideration; if they were dropped, instead of being carried forward in the totals, the amount then upon the barge was taken and the barge started anew.

Mr. McCUTCHEN.—Isn't it quite apparent that it is not from the statement of the figures?

Q. Will you go back and give us the deliveries to that barge?

The COURT.—It was 14 tons and 990 tons, or whatever it was, from January 14th to February.

The WITNESS.—That is on February 8th, a total of 1006 tons, 1500 lbs.

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—Q. That is to say, do you mean that with the delivery on January 26th it makes one thousand and odd tons? A. Yes.

Q. Now, find the next delivery, please?

A. The next entry I see, I find rather, is on March 11th; on February 8th it shows 992 tons, 400 lbs. was received from the "Diamond Head"; on March 11th it shows that 992 tons, 400 lbs. was received from the "Invincible," also that 49 tons, 2220 lbs. was received from the offshore bunker; and the "Titania," I [520—465] think it is, 679 tons, 1540 lbs., making a total received of 1736 tons, 780 lbs.

Q. Give me that total again?

A. 1736 tons, 780 lbs.

Q. What have you taken as the total amount received for the purpose of getting your percentage?

A. 881—459.

Q. 881 tons, 459 lbs? A. Yes.

Q. Do you know whether any coal was delivered to the barge after the last date that you have referred to and before she was finally cleaned up?

A. I have not finished going through it yet.

Q. At any rate, if I may interrupt you, you know up to this time, having gone as far as you have, that at least 1700 tons of coal were delivered to the barge, do you not?

A. According to the records, yes.

Q. And for the purpose of determining your percentage you only credited her with 800 and odd tons, didn't you?

A. Yes, as shown by this book.

(Testimony of W. H. Tidwell.)

Q. What do you mean as shown by this book?

A. Exactly what I said.

Q. Leave the book out of consideration. You only credited her with 800 and odd tons?

A. You cannot leave the book out of consideration, —when I used the book in the preparation of the statement.

* * * * *

Q. Does not the book which you have in your hand show that at that time the barge had received 1700 and odd tons.

A. On the date of March 11th it appears to have received 1736 tons, 780 lbs. [521—466]

Q. Now, see if it did not receive some more coal after that?

A. On March 13th it shows a balance of 191 tons, 149 lbs. Then going over to March 27th we find the barge again receiving from the “Wellington” the same amount, 191 tons, 149 lbs.: the “Titania,” 107 tons, 1650 lbs.; offshore bunker, 495 tons, 490 lbs.; offshore bunker 87 tons, 410 lbs.; making a total on the barge at this time of 881 tons, 459 lbs.

Q. Now, as I understand you, she had received 1700 odd tons before the deliveries to which you have just testified; what do those deliveries amount to?

A. 881 tons, 459 lbs.

Q. Now go to the next delivery to the barge, if there is another?

A. There appears not to have been any other. On April 1st it shows the same amount.

Q. Well, in round numbers then, Mr. Tidwell, the

(Testimony of W. H. Tidwell.)

barge received 2400 tons of coal.

A. Approximately, yes.

Q. And for the purpose of determining your overrun, or percentage of overrun, you said she had received how much?

A. Just what the book shows, 881 tons, 459 lbs.

Q. Is your percentage of overrun correct?

A. It would appear not.

(Referring to the case of the barge "Comanche," the cleanup of which is recorded in Table C, on March 31, 1909, the witness gives the figures on which he arrived at his percentage of 14 per cent; these figures being 750 tons, 1241 pounds, received into the barge; checked out 858 tons, 1476 pounds, or 108 tons, 235 lbs. more than the barge received.)
[522—467]

Q. Have you not stated here repeatedly that in making this Table C you had credited the barge with all the coal it received and charged it with all the coal it delivered?

A. Yes, in accordance with the records kept by the Western Fuel Company, the totals shown on each cleanup.

Q. Now, will you take the record of Mr. Mills and let us see whether you have credited the barge with all of the coal that Mr. Mills' books show to have been delivered to it on that occasion or during that period?

A. The record of Mr. Mills under date of March 31, shows that the barge had received 750 tons, 1241 lbs., and checked out 858 tons, 1476 lbs.; overage, 108

(Testimony of W. H. Tidwell.)

tons, 235 lbs., which is the same as shown in Exhibit "C."

Q. Have you credited the barge with all of the coal which Mr. Mills' records show to have been delivered to it during that period and for the purpose of determining that overage?

A. Everything that is shown on the date of the cleanup was the only thing I considered in making the record as shown on this report.

* * * * *

Mr. McCUTCHEN.—Q. For the purpose of determining the percentage of overrun on that barge during that period what figure should you take into consideration?

A. So far as I know I have taken into consideration the correct figures.

* * * * *

Q. Is it a fact that in determining these percentages you did not endeavor in any instance to ascertain the entire amount of coal which had been delivered to the barge and the entire amount of coal which had been delivered by the barge? [523—468]

A. I think I have answered that several times, but at the same time I will simply answer it again by saying that I took the totals which were shown on the date of the cleanup of the barge; I did not go back to see where the barge received its coal or the date upon which it was received or the amounts.

Q. Now, will you go back in this particular instance and see what the barge did receive?

* * * * *

(Testimony of W. H. Tidwell.)

A. On February 10th the "Comanche" appears to have received 786 tons, 2110 lbs. from the vessel "Wellington"; it appears again on March 5th as having received 47 tons, 1150 lbs. from the offshore bunkers. There are several dates here, the 13th or the 12th, and Monday, March 15th 1909, offshore bunkers again, 177 tons, 1450 lbs.

Q. Will you look at—Are you looking at your record or at Mr. Mills' record? A. Mr. Mills'

Q. Under what date did you just find that entry?

A. On March 15th; the 13th or 12th also appears here. The same thing appears on the 16th as to receipts, and the same on March 19th as to receipts; March 20th; on March 22d she appears to have received from the steamer "Thor" 802 tons, 1590 lbs. in addition to the amount already received.

Q. What was the next delivery to her?

A. Then she appears to have dropped some of the totals, and she appears again on March 30th, on account of the steamer "Thor," 54 tons, 1671 lbs.; the "Thor" 695 tons, 1810 lbs., or a total of 750 tons, 1241 lbs.

Q. Now, just add that, if you please, to the coal which you have heretofore stated she received; she had theretofore received 1814 tons and some lbs., did she not? [524—469]

A. I will only take into consideration the tons.

Q. You need not take into consideration the lbs. for the purpose of answering this question. She had received 1814 tons. How many tons did she get on the 29th or 30th of March?

(Testimony of W. H. Tidwell.)

A. 695 tons, 1810 tons.

Q. What is the total of that? A. 2509 tons.

Q. Now, for the purpose of determining your very large percentage of 14.43 what did you charge her with having received? A. 750 tons, 1241 lbs.

* * * * * * * * *

Q. Now give the total deliveries from the barge during that period?

A. 1760 tons. I am only using the tons.

Q. Very well, that will do.

A. 1760 tons, and add to that 858 tons.

Q. And that makes a total of how much?

A. 2618 tons.

Q. What do you find the barge charged with?

A. Taking all the totals into consideration she is charged with 2509 tons and checked out 2618 tons, 109 tons more than was placed on the barge.

Q. For the purpose of determining your percentage of 22.6, what do you charge the barge with?

A. Where did we get 22.6 per cent?

Q. I mean 14.43. What do you charge the barge with?

A. I don't recall any such figure.

Q. You don't recall that you stated that percentage of overage during that period, that it was 14.43?

A. I do not.

Q. Do you remember what you stated it was?

[525—470]

A. Approximately 14 per cent.

Q. What do you find it to be in fact?

A. I have not figured it.

(Testimony of W. H. Tidwell.)

Q. Will you figure it?

A. Dropping the lbs., it is 14.4.

Q. You find that to be the actual percentage of overrun?

A. In accordance with the out-turn from Mills' books, yes.

Q. You have gone through Mr. Mills' books, and you have the items showing the deliveries of coal to that barge, have you not?

A. Well, that is a different question, Mr. McCutchen.

Q. That is not a different question, that is the question I asked you.

A. No, you did not; you referred to 14.43 per cent and asked me to figure it.

Q. Well, we won't stop to discuss that now; figure the percentage on the actual overrun.

A. It is approximately 4.3 per cent.

Q. 4.3 per cent, considerably less than one-third of the percentage that you state on your direct examination.

A. Yes, if I so testified to that particular item; I do not recall it.

Q. We will take the barge "Melrose" again, deliveries to which began on the 10th of June, 1911, and deliveries from which ended on the 14th of September, 1911, where, according to my recollection, you stated the percentage of overrun to be 24 and a fraction per cent; let me ask you preliminarily, with what have you the barge charged during that period?

A. The barge "Melrose" on September 14, 1911,

(Testimony of W. H. Tidwell.)

Mr. Mills' [526—471] books show 706 tons, 597 or 599 lbs., I don't know which it is—I think it is 599.

Q. And what have you credited it with?

A. 878 tons, 490 lbs.

Q. And you stated that the percentage of overage was 24 and a fraction, did you not?

A. I don't recall testifying to the particular item but I can tell you at the present time what it is; it is approximately that, yes.

Q. Now, what coal did the barge get before the cleanup on September 14th?

A. There appears an item on June 10th of ex-offshore bunkers, N. W. account of "Melrose," 22 tons, 1540 lbs.

Q. Now, give the next one?

A. On June 14, the "Thor," 1043 tons, 1740 lbs., making a total of 1067 tons, 1040 lbs.; the same totals appear on June 15th; on July 6th she appears to have received from the offshore bunkers 595 tons, 1920 lbs., additional, making a total of 1662 tons, 720 lbs., with a total discharge of 707 tons, 761 lbs., leaving a balance in the barge of 954 tons, 2199 lbs. The same entry appears as to totals on July 8th, with a total discharge on this date of 1046 tons, 713 lbs.

Q. Does that include the 707 tons?

A. Oh, yes, that is my understanding. Wait just a minute—yes, it includes the 707 tons. On July 12th it appears again with the same amount of tonnage charged to the barge and having discharged 1400 tons, 2007 lbs.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Q. That was the total discharge up to that date?

A. Yes. Again on July 14th the same amount of tonnage having [527—472] been received and she had discharged 1651 tons, 1045 lbs., leaving a balance of 10 tons, 1915 lbs. in the barge. Again on the 19th she received additional tonnage amounting to 3053 tons, 1200 lbs.

Mr. McCUTCHEN.—Q. Do you mean to say she got 3,000 tons additional or that she got additional coal amounting to that total?

A. She received additional coal amounting to that total.

Mr. ROCHE.—Q. And what was that total?

A. 3053 tons, 1200 lbs.; she discharged 1987 tons, 1810 lbs. On June 20, appears an item, on account of “various,” 3053 tons, 1200 lbs.; discharged 2229 tons, 450 lbs.; on the 21st the same entry “various” appears as to 3053 tons, 1200 lbs., with a total discharge of 2375 tons, 1122 lbs.; it appears again on the 15th of August, with a total of 3450 tons, 2180 lbs., with a total discharge of 2645 tons, 282 lbs., a balance of 805 tons, 1898 lbs. On the 16th the same totals appear so far as receipts are concerned; the total discharge on this date, up to and including this date, appears to be 2907 tons, 1223 lbs., a balance of 543 tons, 957 lbs. The next item that I find here—

Mr. OLNEY.—Q. There is one on the 17th, Mr. Tidwell, on August 17th?

A. Yes. Offshore bunkers, “Wellg”—which I presume means Wellington Coal—44 tons, 1780 lbs.;

(Testimony of W. H. Tidwell.)

this balance seems to have been dropped entirely—the balance of 652 tons, 554 lbs.

Q. Mr. Tidwell, that last figure, you have taken the wrong footing, I think; you have the “Nanaimo” instead of the “Melrose”? [528—473]

A. Oh, yes, I see that I have. The balance is 543 tons, 957 lbs., which seems to have been dropped entirely when it is taken up again. In the next instance it shows taking on the barge 44 tons, 1780 lbs.

Q. The next is August 22d?

A. On August 22d the same amount appears, 48 tons, 1070 lbs.

Q. Now, look under the same date, Mr. Tidwell, and you will see the entry of coal taken on.

A. That will follow later with the barge itself.

Mr. McCUTCHEN.—That is 114 tons, 48 lbs.

A. You will find that that follows later. The next item I find on here is September 7th, where she appears to have received from some vessel beginning with the letter “C”—I cannot make out the name of it—230 tons, 1540 lbs.; the “Bovaric,” 145 tons, 2219 lbs.; offshore bunkers, 93 tons, 570 lbs.; from another vessel, 70 tons, 1010 lbs.; offshore bunkers, 40 tons, 1070 lbs.; “James Mee Smith” 114 tons, 850 lbs., or a total of 706 tons, 597 lbs.

Q. I think, Mr. Tidwell, you are running over into another set of deliveries to the barge?

A. Yes, I think so myself, Mr. McCutchen.

Mr. ROCHE.—Q. What was that last date?

A. September 7th.

(Testimony of W. H. Tidwell.)

Q. That was before the date of the clearance as indicated in this table (addressing counsel). Have you a table showing this?

Mr. OLNEY.—No, we have no table, but this shows it correctly.

A. (Continuing.) So far as the record goes here it appears that he has dropped this amount 543 tons, 957 lbs., and it does not again appear in these other totals. I am not absolutely [529—474] sure as to that though.

Q. Mr. Tidwell, right in that very connection, if you will turn to the entry of September 7th, that is the final entry of the overage, is it not?

A. No, not on September 7th.

Q. You are right about that; but there he picks up his totals again. Now, you take there the items to the steamer the name of which begins with "C," and the three subsequent items and add them together and you will get the balance which you think he may have dropped on the 16th of August?

A. You refer to the first four items?

Q. Yes. A. I will simply add the tons.

Q. It will bring it to 541 tons, while this is 543?

A. Yes, 541.

Q. The lbs. of course would make up the difference. You have him then under date of September 7th taking up the balance which he had on August 16th, have you not?

A. Well, I could not state that without examining the books more closely to see whether this was received from any other source, or not.

(Testimony of W. H. Tidwell.)

Q. Well, we can check it in another way; you see the items here of 93 tons, 570 lbs., under date of September 7th, do you not? A. 93 tons, 570 lbs., yes.

Mr. ROCHE.—Those are the figures aggregating that total?

Mr. OLNEY.—No, I am calling his attention to that particular item.

Q. Now, turn to August 15th, and you find that same item there, do you not? [530—475]

A. 93 tons, 570 lbs.; that is, offshore bunkers.

Q. Right under it you find on September 7th the item of 73 tons, 1110 lbs? A. Yes, sir.

Q. And you find that again on August 15th, do you not? A. Yes, sir.

Q. So it is apparent, is it not, that he has picked up on September 7th the balance which he had on August 16th? A. It would appear that way.

Q. Then adding to these first four items to which I have called your attention and which represent the balance on August 16th, the two items of 48 tons, 1070 lbs., which she took on since the balance was made—

A. (Intg.) The 48 tons, 1070 lbs. does not appear under date of August 15th.

Q. No, but I say adding to the balance which appears on August 15th the two items of 48 tons, 1070 lbs. and 114 tons, 810 lbs., which she took on subsequent to that date and to which you have already testified and called attention you get the total, do you not?

A. Yes, that seems to be correct. Let me see about

(Testimony of W. H. Tidwell.)

the "James Mee Smith."

Q. It is under date of August 17th?

A. No, not on August 17th the "Tricolor" discharging on that date.

Mr. ROCHE.—Q. August 19th, isn't it?

A. That is the discharge of the barge "Energy." It is on August 23d, the "James Mee Smith" discharged into the vessel 114 tons, 810—no, that is wrong.

Q. You find the 114 tons, 810 lbs. on the 22d, do you not?

A. On both the 22d and 23d, but the date of the discharge is the 23d. [531—476]

Q. And the item of 48 tons, 1070 lbs., is under date of the 22d, from the offshore bunkers?

A. From what source?

Q. Ex-offshore bunkers, in the lower righthand corner? A. Yes, I see it.

Q. Then you take the balance which she had on hand on August 16th and add these two items to which you have just called attention, 48 tons, 1070 lbs., and 114 tons, 810 lbs., and you get a total of 706 tons, 597 lbs., do you not? A. That is correct.

Q. And that is the final total of deliveries to the barge according to your Table C, is it not?

A. Yes, sir.

Q. Now, in order to get a correct statement of the amount of deliveries to the barge, you should add to the 706 tons the difference between 543 tons and 3450 tons, or about 3,000 tons, should you not?

A. Well, it would appear that way, but I would

(Testimony of W. H. Tidwell.)

not be able to positively state that without going through the entire records of deliveries and discharges but it so appears.

Q. It so appears? A. Yes.

Q. So that the total deliveries to the barge during that time would be approximately 3613 tons?

A. It would be more than that; it is more like 4100.

Q. But you have to deduct the 543, which is carried over?

A. Oh, yes, that is correct; it would be 3613.

Q. Now, that 3613 is the correct total of the deliveries to the barge instead of 706, and of course that is subject to any mistakes we may have made in figuring it right here?

A. Certainly, and that is also subject to the facts being that [532—477] this amount here which we have added making 543 tons does really represent this amount.

Mr. McCUTCHEN.—Q. You can get at it the other way if you take your total of 3400 and add to it 114 and also 49, or whatever the amounts are, you will get the same total.

Mr. OLNEY.—Then we have the correct amount as going into the barge, 3613 tons and we have an overage on that amount of 171 tons?

A. As shown by the record here, yes.

Q. The changes that you have made would not change the absolute amount of the overage?

A. I will figure that now to see if the overage is approximately the same. I have not used the lbs.; I make it 172.

(Testimony of W. H. Tidwell.)

Q. I am simply taking your statement here as 171 tons.

A. Well, it is nearer 172 than it is 171; it is approximately 172.

Q. Now, will you take and figure the percentage which the 171 tons of overage bears to the correct amount of deliveries into the barge?

A. It is a little less than 5 per cent.

Q. It is 4.74 per cent; that would be the correct amount of percentage of overrun on this particular loading and unloading of the "Melrose"?

A. Provided that these amounts are correct.

Q. It would be 4.74 per cent as compared with the percentage of 24 which appears according to your Table C?

A. Yes, I believe it was about 24 per cent. Of course, you understand that that is with the understanding that this balance appearing on a different page was carried forward under the name of three or four different vessels on this page. [533—478]

Q. But if the balance was not carried forward, Mr. Tidwell, then to that extent that the balance was not carried forward the absolute overage is reduced, is it not? That would be the effect of it, would it not?

A. Well, now let me see whether that is so or not; no, the overage would appear here just the same, 172 tons.

Q. But my point is this: she had on hand on August 15th a balance of some 500 odd tons in the barge according to the books? A. Yes, sir.

Q. If that balance was not carried forward, if it

(Testimony of W. H. Tidwell.)

were dropped by Mr. Mills through some mistake, it would simply reduce the actual overage finally as compared with the overage which was shown by Mr. Mills' books?

A. If it were dropped entirely it would have no consideration in this case here, it would be a different matter entirely.

Q. In other words, it would have no consideration in his books and his overage would be figured without regard to the amount of coal on hand, which would exceed the amount his books really showed?

A. I don't know that I catch that, Mr. Olney.

Q. I want you to understand this clearly, Mr. Tidwell, and I want the jury to understand it too. My assumption is that he carries forward on August 16th a certain balance, putting it in various items; you say that it may be possible that he did not carry it forward—

A. (Intg.) No, I did not say that, if you will pardon me; I said if he did.

Q. You said that if he did carry it forward then these percentages of 4.75 were correct?

A. Yes. [534—479]

Q. Now, I say to you, that if he did not carry forward his balance it would have the effect of not only reducing the percentage of 4.74 but of reducing his final absolute overrun, would it not?

A. No, sir, it would not, for the reason that on this particular date of August 16th, any coal that went into the barge previous to that time or had been discharged would not be taken into consideration at all

(Testimony of W. H. Tidwell.)

in the cleanup of the barge here; the barge would have had on board so many tons of coal and discharged so many.

Q. The situation would be, if he did not carry forward his balance, that he would have actually on hand—

A. (Intg.) Oh, I think I catch your point now.

Q. I want the jury to catch it too. The situation would be that, if he failed on August 16th to carry forward his balance, then the boat would go on with over 500 tons on board which did not appear in his books at all? A. Yes.

Q. And accordingly, when he came finally to figure his overage he would figure the overage as if she had received 500 less tons than she really got?

A. Yes, that would be true excepting for this reason—

Q. In this particular case it would completely wipe out the overage, would it not?

A. It would be true if the 543 tons were actually on the barge; but if it were simply on paper then of course it would be another matter.

Q. As I understand it, Mr. Tidwell, you are testifying here entirely from these tables?

A. Yes, that is true, but at the same time, now that you have [535—480] gone further than that, you have gone into the book; at the present time we are testifying to the book.

Q. Well, I limited my question then too much there; you have been testifying from the books, have you not? A. Yes, and the tables.

(Testimony of W. H. Tidwell.)

Q. And the tables were prepared from the books?

A. Yes, sir, from the books.

Q. Now, I say, taking the tables as they stand, and if as a matter of fact he has dropped his balance, then it further reduces the percentage and, as a matter of fact, turns the overrun which he got into a shortage, does it not?

A. Yes, that is true, provided as I said before, that the 543 tons was actually coal and was not water.

Q. Now, I will come right back again to that proposition: we are speaking again of the tables, or of the books themselves, and you have limited yourself in your testimony here, Mr. Tidwell, to that fact; now, why do you inject something outside of that?

A. I am merely trying to explain to counsel my idea in the matter.

Q. Yes, but you are not trying to explain in that answer what these tables show or what these books show, are you?

A. We were not testifying as to the tables, we were testifying as to this book.

Q. Exactly, and I say again, Mr. Tidwell, that so far as the books go, if the balance of 500 tons were dropped it means that so far as the books are concerned there was a shortage in this particular case instead of an overage, does it not?

A. Yes, so far as the books are concerned.

Q. And, as I understand you, your testimony is limited to that, is it not?

A. Yes, that is true. [536—481]

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—Q. Now, then, instead of that percentage being—

The COURT.—Instead of being 24 it is 4.3-4?

Mr. McCUTCHEN.—Q. That is to say, this would be one-sixth of what you stated on your direct examination?

The COURT.—Yes.

A. Yes, sir.

* * * * *

Mr. OLNEY.—Q. Have you got Table C there?

A. Yes.

Q. Refer now to page 77, Table C.

Mr. ROCHE.—Is that the page on which the totals appear?

Mr. OLNEY.—Yes.

Q. On page 77 of Table "C" you have totaled the deliveries into the barges by years, have you not?

A. Yes.

Q. And you have obtained a figure of some 563,779 tons for the period of 1906 to 1912 inclusive?

A. That is true.

Q. And during that same period, you have found an overrun of some 33,233 tons?

A. Yes, which appears on page 80.

Q. And you testified also, did you not, that the percentage of overrun, of barge overrun, was about 6 per cent? A. That is true.

Q. Now, that 6 per cent was obtained by figuring the percentage which 33,233 tons bears to this amount which went into the barges, of 563,759 tons?

A. That is correct.

(Testimony of W. H. Tidwell.)

Q. Now, in getting this total of 563,759 tons, you have considered, have you not, simply the deliveries into the barges as shown by Table C?

A. Yes. [537—482]

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [538]

Q. In other words, wherever a balance was struck and taken up by Mr. Mills in the manner that has been indicated here, the deliveries which were so lost sight of and carried forward simply in the form of a difference, are not carried into your totals?

A. No, merely the totals as shown on the date of cleanup in Mr. Mills' books.

Q. In other words, take this particular case about which I was examining you a minute ago, and it appeared that some 2900 tons in that one case alone had been dropped out. Now, that 2900 tons is dropped out of your total, is it not?

A. Well, yes, I should say it was. I should state that, to the best of my information. I could not say it is positively, but if it is, I don't know where it is taken up.

Q. On the other hand, the carrying forward of this balance in the way indicated does not affect the total overrun, the absolute total run?

Mr. ROCHE.—In tons?

A. No, I should say not; that is also subject to the same answer.

Mr. OLNEY.—Q. So, as a matter of fact, this figure of 563,000 tons which you have as going into the barges and upon which you have figured your per-

(Testimony of W. H. Tidwell.)

centage of 6 per cent, should be increased by the amount of every one of these balances which Mills has carried forward in the way indicated?

A. Yes, I should say so.

Q. So that your percentage of 6 per cent would be proportionately reduced?

Mr. ROCHE.—Of course, you understand, Mr. Olney, that the discharges would likewise have to be added in here.

Mr. McCUTCHEN.—As far as that goes, the discharges are in there. In order to get at that point, I ask this question, [539—483] and I will ask it again, the carrying forward of these balances by Mr. Mills, and the failure to include them in total receipts, or rather the failure to include the deliveries upon which the balances are disputed in Table C does not affect the gross amount in tons of the overage.

A. I don't think it would materially affect it.

Q. It would not affect it in any way?

A. I am inclined to think it would not.

Q. The final result of it is that as a matter of fact, according to Mr. Mills' books more coal went into the barges than is shown by Table C, and the percentage of overrun is less than you have figured it out, 6 per cent?

A. If the three or four that you have called attention to are all, this would not materially reduce the per cent.

Q. I suppose there are a great many others?

A. It would depend on how many there were.

(Testimony of W. H. Tidwell.)

Q. But to the extent to which they exist, what I have indicated as true would be true, would it not?

A. Yes.

Q. Now, you have made no investigation to ascertain to what extent this is true, this dropping of deliveries and carrying them forward by way of balances, have you?

A. No, I have only made investigation as to the ones which you have called attention to, presuming, of course, that was all.

Q. What right had you to presume that?

A. Because I thought you would call attention to them if there were others.

* * * * *

Mr. OLNEY.—I would say, Mr. Tidwell, there are others, if you want the information. How many there are, we, ourselves, do not know as yet. [540—484]

Mr. ROCHE.—I understood Mr. McCutchen to say they were incorrect in every instance.

Mr. MOORE.—They practically run through the whole business, whenever a barge accepts any large amount of coal that ran into a large number of items.

Mr. McCUTCHEN.—Let me ask the witness in that connection if he will take the time to see whether he has found any error in favor of the defendants in the statement that he has presented. Will you do that?

The WITNESS.—I don't know that I understand your question.

Q. We have shown you several very glaring errors

(Testimony of W. H. Tidwell.)

in the statement of percentages to the disadvantage of the defendants, have we not?

A. You mean as far as the record is concerned?

Q. Yes. A. Yes.

Q. Will you take the time to see whether you can find if you have made any error in favor of the defendants in the statement of any of those percentages?

A. You mean with this?

Q. No, the percentages you stated on your direct examination.

A. I have accepted what was shown by the books, whether it was for or against the defendants.

Mr. McCUTCHEN.—We did not think it was necessary to cover all of this, but in view of the statement of the witness, we will have to consume some more time.

(Referring to the case of the barge "Theobold," which discharged on September 29th, 1909, and tracing back the entries in Mr. Mills' diaries with reference to that barge, and [541—485] comparing them with Table C, the witness proceeded with his testimony as is hereinafter immediately set forth.)

Q. On September 27, do you know that she still had 951 tons, 480 pounds on?

A. On September 27th—I have traced it down to September 1, that she has 370.

Q. Did you find in your tracing a balance?

A. Yes, there is a balance there of 370 tons.

Q. And isn't the result of that balance in this case the same as indicated in the previous case, about

(Testimony of W. H. Tidwell.)

which you have been examined this morning?

A. That I could not tell you, I do not know.

Q. Will you kindly ascertain?

A. I am attempting to. Now, again, on September 15 it appears "Theobold" and the first two items on the page make approximately the same as the balance carried forward from September 1; the balance is 370, and the items appearing under September 15 are 50 tons and 319 tons, which would be 369 tons.

Q. Where are you carrying that forward from?

A. From September 1 to September 15.

Q. Now, it shows, does it not—Mr. Mills' book shows on September 1 that there had been loaded into the barge "Theobold" 2554 tons?

A. Yes, and odd pounds.

Q. And odd pounds, yes. And that she had a balance on hand at that date after certain deliveries of 370 tons? A. Yes.

Q. Now, it appears, does it not, from the item under date of September 15, that he has not carried forward these deliveries of 2554 tons into the barge "Theobold," but has carried forward. [542—486] simply the balance which he had on hand the first of September?

A. No, it does not show the balance carried forward at all, the 370 tons.

Q. Just take these items. A balance is shown as 370 tons 1068 pounds. A. That is true.

Q. And among the deliveries there is a delivery of 319 tons, 2010 pounds, is there not?

A. Yes, that is true, that is on the 15th.

(Testimony of W. H. Tidwell.)

Q. And you find also on the 15th—did you say you found this 319 tons 2010 pounds under the 15th?

A. Yes.

Q. You also find that item under the first, do you not? A. Yes, it is the “Titania.”

Q. And you add to that amount the first item which you find under the 15th of 50 tons, 1298 pounds, and you get the balance, do you not, of 370 tons, 1068 pounds, which he had on the first?

A. Yes, approximately that ; I have not figured the pounds.

Q. Does not that indicate that Mr. Mills carried forward his balances and did not carry forward the amounts which had been charged into the barge?

A. It would indicate it.

Q. So that this, again, is another case in which the actual percentage of overrun, the percentage of overrun, should be reduced?

A. Well, I don't see why it is checked out there.

Q. We will ask you to check it out during the recess.

Mr. ROCHE.—Of course, you will concede the overage so far as the tonnage would be concerned, would be the same.

Mr. MOORE.—Yes.

Mr. OLNEY.—In this particular case. [543—487]

Mr. MOORE.—As the coal received in the barge is much greater than these tables charge it with, the percentage is reduced accordingly.

Mr. ROCHE.—Of course, there is no question about that, so far as the percentage is concerned, but

(Testimony of W. H. Tidwell.)

the excess coal tonnage at least remains the same.

Mr. MOORE.—But instead of being 5.8 per cent, the percentage should be about 2 per cent.

Continuing the discussion of the barge “Theobold,” the testimony proceeds as follows:

A. On September 1st, 1909, the barge “Theobold” appears to have had on board 2554 tons, 670 lbs., and had discharged 2183 tons, 1842 lbs., leaving a balance of 370 tons, 1068 lbs. It appears again on September 21st with a total of 1048 tons, 988 lbs., and there was discharged 1081 tons, 1872 lbs., which shows an overage of 33 tons, 884 lbs.; and also the figures 807, which evidently refer to tons, and 786, which probably refers to lbs. * * * On the 24th the barge appears to have a total of 951 tons, 418 lbs., and to have discharged 125 tons, 896 lbs. It appears again on September 29th with the same total so far as receipts are concerned, with a total discharge of 1078 tons, 1030 lbs. Now, as to the total amount received in the barge—I will simply use the tons and not the lbs. in the calculation which I will make—the barge appears to have received a total of 4183 tons and discharged 4342 tons.

Q. Making a difference of what?

A. Making a difference of 159 tons.

Q. And the percentage there is what?

A. About 4 per cent. [544—488]

Q. Just go over that again, please, Mr. Tidwell, and let us have the coal received by that barge.

A. 2554 tons.

Q. On what date?

(Testimony of W. H. Tidwell.)

A. That was on various dates, but that was the total on September 1st.

Q. What are the various dates?

A. I don't know how far back that goes, I didn't look that up; she appears on August 12th as having received 428 tons, 648 lbs., from the vessel "Thor."

Q. Was that the first delivery made to her?

A. That is the first that I have located here.

Q. If I may interrupt you a moment, Mr. Tidwell, what is the overage shown on your Table C?

A. I think it is 127.

Mr. ROCHE.—In other words, the books of Mr. Mills show a greater overage than the tabulation, so far as excess tonnage is concerned.

Mr. OLNEY.—The overage shown by Mr. Mills' books is 127 tons.

The WITNESS.—This is 169 tons.

Mr. ROCHE.—That is true, Mr. Olney, so far as the overage is concerned at the time the barge cleared, but as a matter of fact the actual excess tonnage as testified to by the witness is 159 tons. That is one of the instances where the error, if there was any error, was for the benefit of the defendants.

A. (Continuing.) On August 14th the barge seems to have had a cleanup, with an overage of 85 tons, and then she starts in again—that was on the 11th, I should have said the 11th instead of the 14th. [545—489]

The witness here continues tracing the coaling operations on the barge from August 12th to September 21st, and his testimony proceeds then as follows:

(Testimony of W. H. Tidwell.)

On the 21st, 1048 tons, 988 lbs., received, and a discharge of 1081 tons, 1872 lbs. And on the side appears the words "over 33 tons, 884 lbs.," and also the figures "807—786," with two items in the figures stricken out in red ink.

Mr. ROCHE.—Q. As a matter of fact, the books show that a certain amount of coal was carried forward notwithstanding the figures and language indicating a clearance; is not that correct?

A. Yes. Those particular items seem to be stricken out. There appears to have been a cleanup there, but at the same time the other figure appears there of 807, which he may have carried forward and may not. It appears again on September 24th, with a total of 951 tons, 480 lbs., and with a discharge of 125 tons, 896 lbs. Again on the 27th, total receipts, 951 tons, 480 lbs., and a total discharge of 526 tons, 1774 lbs. On the 28th the same receipts appear, with a total discharge of 945 tons, 654 lbs. Again on the 29th, the date of the cleanup, 954 tons, and 480 lbs. received and 1078 tons and 1030 lbs. discharged; overage, 127 tons, 550 lbs.

Q. You have finished that now, have you?

A. Yes, sir.

Q. Now, I understood you to say in answer to a suggestion by Mr. Roche, that these figures which you have just developed here, were more favorable to the defendant than the figures which you had previously given in Table C; is that true?

A. I don't recall making any such remark.

Q. Well, Mr. Roche made that statement; do you

(Testimony of W. H. Tidwell.)

agree with it? [546—490]

A. This is more favorable, yes; it gives a balance; that is, it gives a greater overage, of 160 tons, but the percentage of course is less than the amount which would be shown by taking simply this table into consideration.

Q. Turn to that transaction in Exhibit "C."

Mr. ROCHE.—It is on page 44.

A. Yes, I have it.

Mr. McCUTCHEN.—Q. What are the total deliveries to the barge there? A. 951 tons, 480 lbs.

Q. What is the total overage which you have there?

A. 127 tons.

Q. What is the percentage of overage according to your Table C which you say was made up from these books? A. It is about 12½ or 13 per cent.

Q. It is over 13 per cent, is it not?

A. About that.

Q. What is your percentage of overage as you have derived it from these detail figures you have given us? A. About 4.

Q. And do you say that 13 per cent is more favorable to the defendants than 4 per cent would be?

Mr. ROCHE.—Just one moment, we object—

The COURT.—He did not say that and did not pretend to say it. He said that the amount of overage was greater and the percentage less.

* * * * *

Mr. McCUTCHEN.—Q. Will you see if you can identify in "Exhibit C" the tabulation which shows or which is intended to show the receipts of coal and

(Testimony of W. H. Tidwell.)

the discharge of coal from the barge "Melrose" beginning February 11, 1911, and ending April 6th of that year? [547—491]

Mr. ROCHE.—It appears on page 60 of your Table C, I have it here.

Mr. McCUTCHEN.—Q. The overage in that case appears to be 47 tons, 849 lbs., does it not, according to your Table C? A. Yes, sir.

Q. And according to your Table C what was the total delivery to the barge? A. 1429 tons, 462 lbs.

Q. Oh, no, you are evidently looking at the wrong column.

A. Oh, pardon me, 1381 tons, 1853 lbs.

Q. Have you given me from Table C the total deliveries to the barge on that occasion?

A. As shown by the cleanup?

Q. Well, will you look at Mr. Mills' books and see whether you have given the total deliveries to the barge?

A. I find on April 6th that the barge had received 1381 tons, 1853 lbs., and had discharged 1429 tons, 462 lbs., overage 47 tons, 849 lbs.

Q. Those are the totals you have used in preparing Exhibit "C," are they not? A. Yes.

Q. Now, I ask you if you will give the details of the deliveries to and discharges from that barge?

Mr. ROCHE.—What is the date upon which the barge first took coal?

Mr. McCUTCHEN.—February 11th.

Mr. ROCHE.—That may assist you, Mr. Tidwell.

A. The first date that I find is February 10th; 161

(Testimony of W. H. Tidwell.)

tons, 1659 lbs., from the vessel "Puritan"; on the following day she appears to have received at that time 884 tons, 1539 lbs., from the "Puritan." It also appears that on the 15th she had received an additional tonnage of 27 tons, 1210 lbs. from the offshore [548—492] bunker. Do you want me to include in this the discharges as we go along?

Q. I want you to include all the figures necessary for you to be able to tell what the percentage of overage was.

A. It appears on several dates intervening, but I will go to the totals. It appears on February 23d with a total of 1812 tons, 1359 lbs., and a total discharge of 1305 tons, 320 lbs.

The witness here continues tracing the receipt and discharge of coal on the barge "Melrose" on various dates intervening between February 23d and April 5th, and then the testimony continues as follows:

On April 6th, the date of the cleanup, 1381 tons, 1853 lbs.; total discharge 1429 tons, 462 lbs.; over, 47 tons, 849 lbs.

Q. What was the total amount of coal which the barge received during that period?

A. I will only use the tons again, as I have previously. The total amount received was 3421 tons, the amount discharged was 3468 tons, a difference of 47 tons.

Q. And what is the percentage?

A. It is about 1½.

Q. A little less than 1.4, is it not?

A. I have not figured it out to the decimal.

(Testimony of W. H. Tidwell.)

Q. What did you credit the barge with having received in your Exhibit "C"?

A. The figure I have already testified to, 1381 tons, 1853 lbs.

Q. And in that way you get a percentage of 3.46, do you not?

A. I don't know; I have not figured the percentage; I presume that is the fact. [549—493]

Q. You can tell by a very casual inspection of those figures that it would be more than twice the percentage you would get by using all of your figures, that is to say, by taking all the coal that went into the barge and all that came out of the barge?

A. Yes, that is right.

Q. You say you charged the barge in that case with 1381 tons?

A. I don't say I did, I say the records charge it with that amount.

Q. That is the quantity in your Exhibit "C"?

A. Yes, sir.

Q. And you find that the actual quantity that went into the barge was 3421 tons according to Mr. Mills' books? A. Yes, sir.

Q. So that 2040 tons of delivery of coal to that barge do not figure in your Exhibit "C" at all?

A. Whatever the difference is.

Q. As to that extent at any rate Exhibit "C" fails to represent the total delivered to the barge as shown by the Mills' books.

A. Exhibit "C" has never proposed to represent

(Testimony of W. H. Tidwell.)

anything but the out-turn of the Mills' books, the out-turn of each barge.

Q. Does it show the out-turn on this particular barge? A. It does.

* * * * * * * *

Mr. STANLEY MOORE.—If your Honor please, just a question or two in respect to the laying of a foundation, and then the cross-examination will be through.

Q. Mr. Tidwell, you testified here yesterday that neither directly nor indirectly have you made any arrangement with any newspaper in regard to giving it a preference as to news or as to a scoop or the inside of the story, however it might be termed, respecting this matter, did you not?

* * * * * * * *

[550—494]

A. Yes, sir.

Q. Now, I want to ask you, Mr. Tidwell, and directing your attention particularly so far as the first occasion is concerned to the month of February of last year, February, 1913, I want to ask you whether or not in the office of the collector in this city and county, the collector then being Mr. Frederick S. Stratton, and he being present and you being present, if Mr. Stratton, having sent for you, did not say to you, "Mr. Tidwell, the representatives of the newspapers are complaining to me, the representative of the "Chronicle," of the "Examiner" and of the "Post," and they are claiming that you have made some kind of an arrangement with the "Bulletin"

(Testimony of W. H. Tidwell.)

that you are giving them the preference as to the news with respect to this Western Fuel matter. Now, Mr. Tidwell, is it true? Have you made any such arrangement as that?"

* * * * *

Q. (Continuing.) And when Mr. Stratton asked you, Mr. Tidwell, "Is that true," did you not then and there reply, "Yes, it is"; and did not Mr. Stratton thereupon say to you, "Mr. Tidwell, why did you make any such arrangement as that," and did you not then say, "Well, I have made the arrangement," and mentioned something in that behalf in connection with a Mr. Powers, and did you not then and there further continue and say, "And moreover, I have written to Washington, or I have written to my Chief about it, and they know about my having made that arrangement"?

A. The conversation as related by you to a certain extent took place between Collector Stratton and myself, not entirely, but it had no reference to the Western Fuel case; it had reference to the case of Robert Donaldson, who was indicted for opium smuggling. [551—495]

Just state, Mr. Tidwell, if I may be permitted to ask you, did you not say in that conversation, "I have written back to Washington and my position has been approved"?

A. I recall nothing of that character.

Q. Well, as a matter of fact, did you write back to Washington respecting any special arrangement made with the "Bulletin" either concerning the case

(Testimony of W. H. Tidwell.)

of Mr. Robert Donaldson or the case of the Western Fuel Company?

* * * * *

A. I deny writing any such letter.

* * * * *

A. (Continuing.) And I would like to explain it if I may be permitted to do so.

* * * * *

A. (Continuing.) Sometime early in the year 1912, the date I do not recall, two newspaper representatives of the "Bulletin," Mr. Masters and Mr. Gleason came into my office and stated that they had certain information concerning opium smuggling by one Donaldson which had been given to them by a man by the name of Powers, and if I would like to get in touch with the matter they would see that I met Powers. They also stated that Powers had some other information concerning the false weighing of coal. In a few days Powers came into my office. At the same time either Mr. Gleason or Mr. Masters, I don't know which, said, "Of course, you know what we want in this matter." A few days later Powers came into my office and I had a talk with him concerning both the opium smuggling and the Western Fuel matter, which I brought out to some extent from him. Later I obtained a statement from Powers in writing concerning the Western Fuel matter, also as to the opium smuggling matter. In the due course of time— [552—496] at that time I took up the question of the smuggling of opium by Donaldson, investigated the case, and in due time presented it

(Testimony of W. H. Tidwell.)

to the United States Grand Jury, and on the date on which the case was presented to the United States Grand Jury Mr. Gleason again appeared at my office and said, as I recall the conversation, "When will you present the Donaldson case?" I said, "I think this afternoon." That was all the conversation that I recall having had with Mr. Gleason or with Mr. Masters in connection with the matter. Sometime later—I will lead up now to the conversation with Collector Stratton; sometime later—on the same date, I think it was, the representative of the "Post" said that he understood that I had given a story to the "Bulletin," and wanted to know if I would give it to the "Post." I told him that I had not given any story to the "Bulletin," nor would I give any to the "Post." He then went, as I understood later, to Collector Stratton's office and complained about the "Bulletin" getting the news and the "Post" not obtaining it. Later Collector Stratton—and I hate to relate this part of it—Collector Stratton and I had a very serious disagreement. Collector Stratton made a number of detrimental remarks about me, and in addition to that accused me, as I have understood—not personally, but I understood that he made such remarks—that I had an understanding with the "Bulletin" by which I was to give it all the information that I had, not only concerning opium but about the Western Fuel case, which was absolutely false in every respect. There was never any understanding that either Mr. Gleason or Mr. Masters would obtain anything at all regarding the Western Fuel

(Testimony of W. H. Tidwell.)

case, and I have not given Mr. Masters or Mr. Gleason or any other newspaper reporter any information except in a general manner concerning the Western Fuel case. [553—497] To illustrate the general manner that I speak of, I mean meeting them in the hall after I leave the courtroom in the afternoons and they would say, "What are you going to do tomorrow," or something of that kind or character, just casual matters. But there was never any understanding that any newspaper, or newspaper man, or any newspaper itself would obtain any exclusive story or any inside information concerning the Westren Fuel case.

Mr. STANLEY MOORE.—Q. Now, Mr. Tidwell, before making the explanation you stated that you never did as a matter of fact write a letter back to the authorities at Washington concerning any arrangement with any particular newspaper; that is your testimony, is it?

A. I don't recall writing such a letter, Mr. Moore. I know that Mr. Stratton made such a statement and in reply to that I answered it; it was referred to me for answer and I answered it.

Q. Well, Mr. Tidwell, did you, or not, state to Mr. Stratton, in the course of that conversation, whether in point of fact you had or had not written back to Washington, did you state to Mr. Stratton in the course of that conversation that they knew about this arrangement back in Washington, or you had written it to your chief, and he approved of it?

A. I don't recall anything of that kind or character.

(Testimony of W. H. Tidwell.)

Q. Is it simply that you don't recall whether in fact you made such a statement?

A. I should say that I did not, Mr. Moore, because I think I would recall it if I did. As I said before, Mr. Stratton and I were not on good terms at all and I was always rather careful and would watch all of my remarks with him; in fact, at the end of his administration we were not on speaking terms.
[554—498]

Q. Mr. Tidwell, can you remember positively one way or the other about that?

A. I should say that I did not.

* * * * *

Mr. STANLEY MOORE.—Q. Did or did not Mr. Stratton say to you in that conversation that the reporter of the "Post," the reporter of the "Chronicle," and the reporter of the "Examiner," all three, had complained to him and claimed that you had such an arrangement with the "Bulletin" respecting the Western Fuel case? A. No, sir.

* * * * *

Mr. STANLEY MOORE.—Q. Now, I want to ask you this further question, Mr. Tidwell, and this is also with respect to foundation: Was not that matter or claim mentioned on a number of occasions, to the number of half a dozen different times between yourself and Collector Stratton, this matter of the claim or the complaint in regard to this arrangement or alleged arrangement with the "Bulletin"?

* * * * *

A. I do not recall it. I remember this particular

(Testimony of W. H. Tidwell.)

occasion in connection with the "Post," but I do not recall any other; but that was in connection with the Donaldson case.

Mr. STANLEY MOORE.—Q. You do not recall the matter ever coming up in conversation between you then, as I understand it, except upon one occasion; is that correct?

A. I don't recall any. He might have mentioned it; I don't recall.

Q. And that is the extent of your recollection, the one occasion?

A. That is all, when the "Post," I think it was, complained [555—499] to him that the "Bulletin" was getting certain information which they were unable to obtain.

Q. Well, the point of my question is, Mr. Tidwell, and I will only ask it once more, do you remember a conversation between you and Mr. Stratton upon that subject-matter upon more than one occasion?

A. I do not.

Q. The question included, of course, that it was at the Collector's office, and in the City and County of San Francisco; you understood that, did you not?

A. Yes. I think that is where I had the conversation with him about the opium transaction.

The date, June 24th, 1913, to which I testified yesterday as the date of my conversation with the collector of the port, when I protested against the Western Fuel Company being permitted to use the records of the custom-house, was several weeks before Mr. Sullivan or Mr. Roche had any connection with this case.

(Testimony of W. H. Tidwell.)

(Admitted by counsel for the prosecution that it was several weeks thereafter, that is after said appointment of Messrs. Sullivan and Roche, that any formal request or subpoena was issued against the Western Fuel Company, calling for the production of their books and papers, and that such subpoena was issued some time in the early part of August, 1913.)

Q. Is it not the fact that papers and books—all of them,—requested by you, of whatever nature, prior to the time of the indictment had been furnished you? [556—500]

* * * * *

A. No, our original subpoena asked for all books and records.

Q. And as to that subpoena, Mr. Tidwell, there was an agreement that they would allow you to go down there, was there not?

A. Yes, that they would furnish all books and records whenever they were desired.

Q. And you went down there pursuant to that understanding, did you not, together with your assistant? A. Yes, sir.

Q. Now, I want to ask you, after you went down there into the offices of the Western Fuel Company with your assistants whether or not you asked for a single book or paper which was refused you?

A. I did not want all of the books and papers at that particular time. I was working on certain records which are represented by Exhibits "A," "B" and "C"; after the completion of those records they

(Testimony of W. H. Tidwell.)

were returned, and it was my desire to look over other records of the Western Fuel Company; on one occasion a request was made on Mr. Norcross by telephone, and as I remember it, Mr. Norcross agreed to furnish the records; later I was advised that under the advice of Mr. Olney they would not be furnished; the matter was then taken up with Mr. McNab, who was the then District Attorney, and he authorized me to talk with Mr. Olney over the telephone concerning the matter; those particular records at that time were supplied. Later it was the desire to go further into the matter, and about that time, so far as I can remember now, Mr. McNab's resignation occurred, or soon after that. There were certain parties came into the custom-house, and I think one was W. B. Billingham, custom-house broker for the Western Fuel Company, [557—501] and were going over the custom-house records for the Western Fuel Company, and I learned that such was being done and I objected to it to Collector Stratton.

Q. That concludes your answer, does it?

A. I think that answers your question fully.

Q. Mr. Tidwell, you went a little ahead of my question, and I am going to go back again just briefly. The question was addressed to the time when you were down in the office of the Western Fuel Company with your assistants.

A. I was there only for a few days.

Q. Were you not there over two weeks?

A. I don't think so.

* * * * *

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—Q. Then, Mr. Tidwell, what refusal of papers had there been to you by the Western Fuel Company? What papers did you ask for that you had not actually obtained prior to June 24, 1913? A. I asked for the financial records.

Q. Were they not given to you?

A. I never had the financial records until recently.

Q. Who did you ask for them?

A. Mr. Norcross.

Q. When did you ask for them?

A. The date I made no note of.

Q. Was it prior or subsequent to the 24th of June?

A. That I cannot answer. I do not know. I made no note of it, not even a mental note of it. I should say it was before that.

Q. Then I come back to you with the question again, Mr. Tidwell, do you mean to be understood as testifying here that there was any paper that you asked for of the Western Fuel Company prior to the date of this interview of June 24th [558—502] with the collector—any paper prior to that time that you did not get?

A. I have just answered that question that to my best remembrance it was before that, and that is the reason I asked the collector not to permit the Western Fuel people to look over the records. As to the exact date I am unable to say.

Q. Did you state to the collector that they had refused you any papers? A. I don't recall that.

Q. What reason, if any, did you give in your conversation with the collector?

(Testimony of W. H. Tidwell.)

A. I don't recall that.

I don't recall giving as the reason that the documents requested by the Western Fuel Company were not public documents.

Mr. OLNEY.—Your Honor, may I ask the witness a question along this same line?

The COURT.—Yes.

Mr. OLNEY.—Q. You testified that you asked for their financial books of the Western Fuel Company, and that you did not get them and that in your opinion that was prior to June 24, 1912?

A. That is my best remembrance. I cannot state as to the exact date but that is to the best of my remembrance.

Q. I will ask you if your failure to get them was due to any refusal on the part of the Western Fuel Company to let you see them or to produce them at your request?

Mr. ROCHE.—I object to the question as immaterial.

The COURT.—I don't know whether it is, or not. I think the whole matter is a good deal beside the mark. The objection will be overruled. [559—503]

A. My request for them was a telephone message to Mr. Norcross and, as I remember it, I had no response to it except that he said at that time they would be supplied, but they never were supplied.

Q. But you did not follow the matter up with any further request for them, did you?

A. If I remember correctly, Mr. Norcross was to take the matter up with you and it would then be

(Testimony of W. H. Tidwell.)

decided, but I had no response to my request for them.

Q. And you did not take the matter up with me, did you?

A. No, I did not take it up with you. As I understood it, Mr. Norcross was going to take it up with you.

Redirect Examination by Mr. ROCHE.

* * * * *

Mr. ROCHE.—Q. Did you, Mr. Tidwell, during the noon recess, so far as you were able to, go over and compare some of the entries in Exhibit “C” with the entries contained in the diaries kept by the defendant, Mills? A. I did.

Q. And are you prepared to testify at this time that at least in some instances and to the extent to which you were able to go over those books and compare them, the figures contained in Exhibit “C” even so far as percentages are concerned, are correct?

A. Yes, sir.

Q. I would like to have you explain, Mr. Tidwell, very briefly, because I only want to ask you this one question on that subject, how it came about that Table C did not contain all of the deliveries of coal to the barges?

A. For the simple reason that in preparing the table, I accepted [560—504] the records of Mr. Mills as being correct, and took the totals at the date of the out-turn, or the date of the cleanup, as it is called; I accepted the total receipts as being correct, and also the total out-turn as being correct, as well

(Testimony of W. H. Tidwell.)

as the total overage.

Q. Now, let me ask you this question: Irrespective of the question of percentages, would any single one of these inaccuracies called to your attention by Mr. McCutchen, or all of them together, in any way affect the total tonnage of excess so far as quantity is concerned?

A. You mean as to the amount received and discharged?

Q. Yes, as to the amount of overage.

A. No, sir.

Q. In other words, it simply affects the percentage; is that correct?

A. The percentage on a particular barge.

Q. The percentage upon a particular barge?

A. Yes, and it would also affect the total percentage.

Q. That is, the total percentage so far as the excess quantity of coal delivered from the barges is concerned? A. Yes.

Q. You testified the other day that there was approximately 44,000 tons of coal discharged from the barges in excess of the quantity of coal checked in or laden from the barges between January 1, 1904, and December 31, 1912.

* * * * *

A. Yes, approximately, 43,000 tons.

Q. Is it not true that none of these alleged inaccuracies in any way affects that total result?

A. None whatsoever. [561—505]

Q. In testifying the other day Mr. Tidwell, you

(Testimony of W. H. Tidwell.)

also gave to the jury the total excess sales above coal received during a given period; you recall that testimony, do you not? A. Yes, sir.

Q. In other words, you took the quantity of coal on hand upon the first day of April, 1906, together with coal received from that date to and including the 31st day of December, 1912, and likewise took into consideration the quantity of coal sold during that time, together with the coal on hand on the 31st day of December, 1912; you recall that testimony?

The COURT.—And certain coal burned, yes.

Mr. ROCHE.—Yes, your Honor, and when I refer to that, I mean foreign coal.

Q. Do any of these inaccuracies to which you have testified in any way change, or affect, or alter, or minimize the total quantity of coal sold by the Western Fuel Company above the coal received?

A. I should say not at all.

Q. And is it not also true, Mr. Tidwell, that it does not even change the percentage of the total excess of coal sold over coal received? A. No, sir.

Q. You were questioned yesterday upon cross-examination by Mr. McCutchen concerning certain shortages which from time to time appeared on the records kept by the defendant, Mills, as to which you made no memorandum and none of which is shown in Exhibit "C"; you recall that testimony, do you?

A. I don't quite catch that question.

Q. That is, the shortages, so far as the discharge from the barges is concerned? A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Just state very briefly the reason why you made no memorandum or no table relating to these shortages?

The COURT.—He said yesterday it was because the Government was not paying any drawbacks on those shortages.

Mr. ROCHE.—Very well, your Honor.

Q. Mr. Tidwell, in going over the diary books kept by Mr. Mills, did you ascertain whether there were very many instances of shortages, or of a comparatively few? A. Comparatively few.

* * * * * * *

Q. Do you know whether you very frequently ran across a shortage?

A. Very few, in the preparation of these statements, comparatively speaking.

Q. You were examined the other day in relation to certain bills sent by the Western Fuel office at Nanaimo to the Western Fuel office at San Francisco, accompanying bills of lading showing the quantities of coal discharged into certain boats in excess of the bill of lading and invoice figures; do you recall that testimony?

A. I don't know what bills you are referring to.

Q. I am talking about the bills that were sent from the Western Fuel Company's office at Nanaimo to the Western Fuel Company at San Francisco, showing quantities of coal laden upon steamships in which coal was imported from British Columbia to California.

A. Do you mean where the word "actual" is?

(Testimony of W. H. Tidwell.)

Q. Yes. A. I have not testified to those.

Q. But you recall your attention being directed to them? A. Oh, yes.

Q. I ask you if, since your direct examination was concluded, a [563—507] table was prepared by you compiled from those bills, showing the quantity of coal indicated upon the face of the bill as having been the actual quantity of coal discharged into the ship, and the invoice weight, which likewise is the bill of lading weight, and also the ascertained weight?

A. Yes, it was prepared by three of us together.

Q. And was it checked up by you?

A. The final check was made by another party.

Q. I will ask you whether in that table an estimate was made of the difference between what upon the face of these bills is designated and known as the actual weight of the coal discharged into the steamship and the discharged weight here, the out-turn weight? A. Yes, sir.

Mr. McCUTCHEN.—Do you mean, is there a subtraction made?

Mr. ROCHE.—Yes.

Q. In other words, the out-turn weight or custom-house weight at San Francisco was subtracted from the quantity of coal indicated upon the face of the bill as the actual weight of the coal and the difference shown; is that correct? A. Yes, sir.

Q. And likewise an estimate made of the percentage showing the difference between the two figures?

A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Now, I will ask you if it is not true that in a great many instances what appears in Exhibit "A" to be an overage is in fact, assuming that these bills show the actual quantity of coal discharged into the steamship, a shortage? A. Yes, sir.

Q. In other words, Mr. Tidwell, for the purpose of illustration and I will only put one question to you upon this subject, in [564—508] Exhibit "A" it sometimes occurred that the out-turn weight or the custom-house weight showed that there was more coal discharged from the ship than the bill of lading indicated was in the ship; that is correct, is it not?

A. Yes, sir.

Q. And in Exhibit "A," of course, that difference was treated as an overage, was it not?

A. As an overage, yes, sir.

Q. Now, it is also true, is it not, that in a great many instances, if you take the bills as correctly setting forth the actual weight of the coal deposited into the steamship at the port of exportation, that instead of there being a shortage, or rather, I should say, instead of there being an overage, there would, in fact, be a shortage? A. A shortage, yes, sir.

Q. Now, I want to call your attention to these bills. I have these bills separated, and a table compiled from them. Those are the bills to which you refer, are they not? A. They are.

Q. And this is the table which has been prepared, as you have stated, with some assistance, and checked over by all three of you; is that correct?

(Testimony of W. H. Tidwell.)

A. I checked part of it; the final check was made by others.

Mr. ROCHE.—We offer these bills in evidence, may it please the Court, and they may be considered, I suppose, as one exhibit, and they may be considered as having been read. These bills are practically all the same.

Mr. McCUTCHEN.—Are they offered for the purpose of showing that the coal actually weighed more than the invoice weight? [565—509]

Mr. ROCHE.—I simply want to show the circumstances under which the coal was discharged and to explain the difference between the out-turn weight and the bill of lading or invoice weight in those instances where the out-turn weight shows an overage. I will just hand to the jury a few of these bills. They are all the same so far as actual weight is concerned.

I would like to explain to the jury, in connection with these bills, and I suppose you will agree that this explanation is correct, Mr. McCutchen, and this was testified to the other day, that the typewriting would indicate the bill of lading or invoice weight; the red ink figures show the out-turn weight, that is, the custom-house weight at this point, the port of discharge; the matter to which we desire to particularly direct the jury's attention is the typewriting at the bottom of the bill, the actual weight of the cargo, giving the figures. (The document was here marked "U. S. Exhibit 134.")

(At this point Mr. Norcross testified, in response

(Testimony of W. H. Tidwell.)

to inquiries by a juror, that the writing at the bottom of the bill was placed thereon at the same time that the bill was made. In other words, when the bill was received in the San Francisco office of the Western Fuel Company, it contained all the typewriting now appearing on its face.)

This table, U. S. Exhibit No. 134, shows in the first column the date appearing upon the bill, which would be about the time, I think, that the vessel left Nanaimo; in the second column, the name of the vessel; in the third column, the actual weight of the coal as indicated upon the face of the bill, which column is entitled "Actual Weight at Mines," and shows [566—510] the weight which is set forth in typewriting at the bottom of the bill. In the next column, the invoice weight as certified to before the American Consular office at Nanaimo, and upon which entry was made into this port, the invoice weight, of course, being the same as the bill of lading weight; in the next column, the ascertained weight or the custom-house weight, on which duty was paid, this appearing under the designation "Ascertained Weights"; in the next column, which is entitled "Shortage," the difference between the ascertained weight and what is here designated as the actual weight; in the next column, to the right, an overage, wherever it appears, and there are, I think, only five or six of them; in the last column, which is entitled, "Excess of Actual Weight over Invoice Weight," the difference between the invoice weight and what is designated upon those billheads. The totals indi-

(Testimony of W. H. Tidwell.)

cated in this table relate to the various sheets upon which the figures appear, and do not relate to the years.

(Mr. Roche here states that he will read the grand total, instead of the total of each sheet.)

The bills, so far as my investigation served me, showed what was the actual weight of the cargo in the month of October, 1908. That is the first time anything of that kind appeared on these billheads, so far as I know. There are one or two statements there in 1907 which were introduced here in evidence the other day; the actual weight in those instances was set forth on a letter-head instead of on the bill. Those one or two instances do not appear on this sheet. The table was carried down to and including the 24th of December, 1912, which was the last importation of Nanaimo coal for that month of which I have been able to find record. According to the tables to which my attention has just been called, the actual weight at the mines of the cargo is indicated by the figures 466,350 tons. [567—511] The invoice weight is 459,767 tons. The ascertained weight of all these cargoes, discharged at all ports in the State of California, is 466,069 tons, 795 pounds. The difference between the ascertained or custom-house weight and what is designated upon these billheads as the actual weight is 10,365 tons, 2205 pounds, and that represents a shortage, with the exception of the overages which appear, and which have to be subtracted. From this 10,365 tons 2205 pounds, we subtract, therefore, 85 tons, 760 pounds,

(Testimony of W. H. Tidwell.)

indicating said overages. The difference between this weight indicated upon the billheads as actual weight and the invoice weight is 6583 tons. The net shortage according to these figures, and after making allowance for the overage, would be 10,280 tons, 1445 pounds. The percentage of shortage on the basis of actual weight is 2.2 per cent; and the percentage of shortage upon the invoice weight, .8 of one per cent.

(The table is here introduced in evidence, no objection being interposed by the defendants, and is marked "U. S. Exhibit No. 135," and is in words and figures as follows:) [568—512]

[United States Exhibit No. 135.]

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained Weight		Short		Over		#1 Excess of Actual Weight Over Invoice Weight Tons
				Tons	Lbs.	Tons	Lbs.	Tons	Lbs.	
1908										
Oct. 9/26	Tordenskjold	5822	5647	5749	560	72	1680			175
Nov. 10/13	Titania	5872	5696	5725	890	146	1350			176
Dec. 11/23	Thor	7281	7063	7241	1580	39	660			218
Dec. 2	Tordenskjold	5952	5773	5706	1040	245	1200			179
1909										
Jan. 12/24	Titania	5943	5765	5776	757	166	1483			178
Feb. 1/26	"	5863	5687	5692	1040	170	1200			176
Feb. 12	Thor	7312	7093	7158	1440	153	800			219
Mar. 13	"	7307	7088	7244	1690	62	550			219
Mar. 21	Wellington	2354	2284	2348	800	5	1440			70
Apr. 8	Thor	7332	7112	7207	1680	34	560			220
Apr. 22	Titania	5886	5710	5775	1250	110	990			176
May 15	Thor	7422	7200	7323	2120	98	120			222
June 5/26	Wellington	2376	2305	2382	2000			6	2000	71
June 5	Thor	7332	7112	7291	630	40	1610			220
June 17	Titania	5999	5819	5810	1250	188	990			180
July 6/26	Thor	7387	7165	7171	460	215	1780			222
July 6/30	Wellington	2394	2322	2329	1420	64	820			72
July 15	Titania	5899	5840	5704	20	194	2220			59
Aug. 19	"	5961	5901	5725	1680	235	560			60
Sept. 18	Wellington	2363	2339	2311	100	51	2140			24
Oct. 9/17	Titania	(5367 475)	5314 470	5358 449	2090 1600	8 25	150 640			53
Oct. 5	Wellington	2353	2320	2320	1330	32	910			5
Oct. 11	Thor	7399	7325	7289	470	109	1770			74
		129651	126359	127185	1017	2472	983	6	2000	3292

[569—513]

#2

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained		Short		Over		Excess of Actual Weight Over Invoice Weight Tons.
				Tons	Lbs.	Tons	Lbs.	Tons	Lbs.	
1909										
Nov. 11/5	Thor	7291	7218	7135	630	155	1610			73
" 11/18	Leelanaw	2826	2798	2611	1530	214	710			28
Dec. 12/3	Thor	7388	7314	7169	1030	218	1210			74
1910										
Feb. 1/29	Thor	7290	7217	7157	1750	132	490			73
Apr. 3/26	Thode Fagelund	(5869 (896	5810 888	5687 827	230) 510)	250	1500			59
May 4/30	Thor	7366	7293	7224	2120	141	120			8
" 5/7	Leelanaw	2793	2765	2742	230	50	2010			73
June 5/30	Thor	7422	7348	7204	1910	217	330			28
July 7/3	Jethou	6940	6671	6715	1291	224	949			74
" 7/17	Thor	7433	7359	7242	1610	190	630			69
Aug. 8/5	Thor	7458	7384	7260	710	197	1530			74
Sept. 9/20	Thor	7276	7203	7275	940		1300			73
Oct. 10/21	Falls of Orchy	6908	6839	6686	1810	221	430			69
" 10/8	Leelanaw	2786	2759	2681	1050	104	1190			27
Nov. 10/27	"	2826	2798	2854	470					28
Dec. 18		(7011	6941	6911	1700)	101	540	28	470	70
" "	Thor	(206	204	204	)					2
" 4	Caszo	5884	5825	5657	1860	226	380			59
1911										
Jan. 6	M. S. Dollar	6036	5976	6011	1796	24	444			60
" 21	Thor	(7316 (....	7154 89	7101 89	1140))	125	1100			73
		117221	116053	114452	1917	2796	793	28	470	1168

[570—514]

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained Weight		Short		Over		# Excess of Actual Weight Over Invoice Weight Tons
				Tons	Lbs.	Tons	Lbs.	Tons	Lbs.	
1911										
Feb. 11	Thor	7266	7193	7200	930	65	1310			73
" 20	Tordenskjold	(5204	5146	4918	1299	285	941)			58
		(583	583	557	530	25	1710)			
Mar. 2	Thor	7266	7193	7056	1010	209	1230			73
" 15	Saint Ronald	(5767	5461	5170	1970)					
		(...)	248	248	....)	348	270			58
Apr. 7	Henley	5008	4958	4824	650	183	1590			50
" 14	Titania	(5378	5325	5216	460	161	1780)			
		(253	250	250	....	3	....)			56
" 26	(May Vou.) Thor	7381	7307	7309	1670	71	570			74
May 18	Thor	7386	7312	7215	620	170	1620			74
June 4	"	7436	7362	7279	2150	156	90			74
" 17	St. George	1455	1441	1451	790	3	1450			14
" 19	Lonsdale	(2253	2231	2196	1510	56	730			26
		(383	379	379	....	4)			
" 21	Thor	7434	7360	7222	840	211	1400			74
July 7	Boveric	6600	6534	6433	50	176	2190			66
" 16	Coulsden	(6288	6225	6040	1330	247	910)			67
		(377	373	373	....	4)			
Aug. 4	Damara	(7054	6984	6995	1110	58	1130)			76
		(536	530	530	....	6)			
" 11	Tricolor	(3916	3877	3752	1410	163	830)			
		(544	530	531	1960	12	280)			53
" 21	Candidate	(2588	2562	2449	960	138	1280)			
		(510	505	483	1270	26	970)			31
[571—515]		98866	97869	96076	119	2789	2121			997

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained Weight Tons	Short Tons	Lbs	Over Tons.	Lbs.	Tons.	#4. Excess of Actual Weight Over Invoice Weight Tons.
1911										
Aug. 27, (Sept. Vou.)	Thor	3357	3323	3304	52	1230	34			
Sept. 9,	Senator	5149	5098	5021	127	240	51			
Oct. 7,	Bannockburn	7520	7445	7365	154	70	75			
Oct. 28, (Nov. Vou.)	Thor	(7291)	6499	6552						
		(	719	719	19	830	73			
Dec. 2,	Mathilda	6397	6335	6229	167	1610	62			
1912										
Feb. 9,	Thor	7165	7093	7029	135	1450	72			
" 16,	Wellington	2377	2353	2171	205	1800	24			
" 27, (Mar. Vou.)	Thor	7169	7097	7106	62	640	72			
Mar. 18,	Wellington	2318	2295	2313	4	1750	23			
" 31, (Apr. Vou.)	"	2266	2243	2244	21	510	23			
Apr. 5,	Thor	7234	7162	7105	138	580	72			
" 12,	Wellington	2355	2331	2329	25	1250	24			
" 25,	Ikala	6635	6569	6549	85	1320	66			
May 8,	Wellington	2383	2359	2326	56	270	24			
" 18,	"	2459	2434	2329	129	520	25			
June 11,	"	2359	2415	2306	1270	970	56			
May 30, (June Vou.)	"	2369	2345	2310	58	70	24			
June 26, (July Vou.)	"	2395	2371	2348	46	90	24			
July 7,	"	2439	2415	2348	90	150	24			
" 12,	Thor	7252	7180	7107	144	1530	72			
" 18,	Wellington	2396	2372	2342	53	1770	24			
Aug. 20,	"	2379	2355	2360	18	2030	24			
Sept. 10,	Ikalis	6495	6430	6197	297	2110	65			
		100159	99238	98021	2137	990	921			

Date	Vessel	Actual Weight at Mines	Invoice Weight Tons	Ascertained Weight Tons	Lbs.	Short Tons	Lbs.	Over Tons.	Lbs.	Over Weight Tons.	Excess of Actual Weight Over Invoice Weight	#5
1912												
Sept. 19	Wellington	Tons	2304	2317	1240	9	1000					
Oct. 5	"	2327	2227	2297	1210			48	1210	23		
" 26	"	2249	2246	2264	1530	4	710			22		
Nov. 17	Queen Elizabeth	2269	6767	6718	642	116	1598			23		
" 23	Wellington	2271	2248	2246	1850	24	390			68		
Dec. 6	"	2251	2228	2252	1560			1	1560	23		
" 24	"	2251	2228	2235	1900	15	340			23		
[573-517]		20453	20248	20333	972	169	1798	50	530	205		

SUMMARY

SHOWING COMPARISON OF ACTUAL WEIGHTS AT MINES, INVOICE WEIGHTS AND ASCERTAINED WEIGHTS,
ON CARGOES OF COAL RECEIVED BY WESTERN FUEL CO., FROM NANAIMO, B. CO.,
FROM SEPTEMBER 26, 1908, TO DECEMBER 31st, 1912, INCLUSIVE.

Sheet No.	Actual Weight at Mines	Invoice Weight		Ascertained Weight		Short		Over		Excess of Actual Weight Over Invoice Weight	
		Tons	Tons	Tons	Lbs.	Tons	Lbs.	Tons.	Lbs.	Tons.	Tons.
1	129651	126359	127185	1017	2472	6	983	3292	2000	3292	3292
2	117221	116053	114452	1917	2796	28	793	1168	470	1168	1168
3	98866	97869	96076	119	2789	..	2121	997	....	997	997
4	100159	99238	98021	1250	2137	..	990	921	....	921	921
5	20453	20248	20333	972	169	50	1798	205	530	205	205
	466350	459767	456069	795	10365	85	2205	6583	760	6583	6583

Total NET Shortage of Actual Weight=10280/1445 Tons

Percentage of Shortage, on basis of Actual Weight=2.2%

" " " " Invoice " = .8%

Difference between Actual Weights and Invoice Weights=6583 Tons

[574-518]

(Testimony of W. H. Tidwell.)

(The prosecution here states, in answer to a question of the Court, that it is claimed to be the fact that all bills covering the consignments of coal from October, 1908, showed on their face the matters hereinabove, next preceding this exhibit, discussed.)

In a great majority of cases it is a fact that instead of their being an overage in those instances in which the out-turn weight would exceed the bill of lading weight, there would, if you took the figures upon the billheads as being actual weight, be a shortage.

(Subject to correction, it was at this point admitted by counsel for the defendants that a document handed them by counsel for the prosecution contains extracts from what was known as the "Donation Account," appearing in the ledgers of the Western Fuel Company. The document was headed "Extracts from Donation Account."

Conceded also by counsel for the defendants that the figures in all instances represent the money value of the coal. The document was read to the jury by counsel for the prosecution, and was in words and figures as follows:)

[United States Exhibit No. 136—Extracts from
Donation Account.]

EXTRACTS FROM DONATION ACCOUNTS.
"1906.

April	5.	Capt. Anderson	\$18.46
	6.	R. M. Gomez.....	8.00
May	11.	Chief Allen	7.14
June	8.	J. W. Hauxhurst.....	14.06
July	14.	P. McCarthy	8.00
Sept.	8.	Capt. Wilson	10.18
	15.	Mr. Hauxhurst	16.00
Oct.	31.	C. Gomez	8.00
Nov.	28.	P. McCarthy	8.00
Dec.	8.	Capt. Wilson	16.15

1907.

Jan.	18.	Chief Allen	8.00
	30.	W. Chisholm	8.00

[575—519]

Feb.	28.	F. Gomez	\$ 4.00
March	29.	D. Finnegan	8.00
	30.	A. Chisholm	8.00
April	5.	Capt. Anderson	16.00
	16.	E. Farmer	8.00
	26.	Capt. Wilson	16.00
June	30.	Chief Allen	8.00
Aug.	24.	Chief Allen	8.00
Oct.	28.	Capt. Wilson	13.71
Nov.	5.	Chief Allen	8.
	27.	Chisholm	16.00

Dec.	14.	P. F. McCarthy.....	8.00
1908.			
Jan.	11.	Chief Allen	8.00
Feb.	1.	Capt. Wilson	13.57
Apr.	18.	Chief Allen	8.00
May	2.	Capt. Wilson	14.32
	13.	P. H. McCarthy	8.00
July	22.	P. H. McCarthy	8.00
Aug.	31.	P. H. McCarthy	8.00
Oct.	31.	Capt. Wilson	15.71
Dec.	31.	Chief Allen	8.00
1909.			
Jan.	31.	C. Chisholm	16.00
		P. F. McCarthy	8.00
May	4.	Capt. Wilson	17.84
Oct.	31.	W. Chisholm	16.00
		Capt. Wilson	16.43
Nov.	11.	A. H. Freund	9.50
		“ “ “	9.50
	30.	P. F. McCarthy	8.00
[576—520]			
Dec.	31.	A. W. Freund	9.50
1910.			
Feb.	28.	Capt. Wilson	9.70
Mar.	24.	M. Chisholm	8.00
		P. McCarthy	8.00
July	13.	P. A. McCarthy	8.00
Aug.	13.	B. A. Harnett	20.00
		Capt. Wilson	15.82
Oct.	19.	P. H. McCarthy	8.00

(Testimony of W. H. Tidwell.)

	15.	Capt. Lewis	10.00
	22.	—— Roundy	7.10
Dec.	31.	Capt. Wilson	16.43
1911.			
Jan.	10.	P. M. McCarthy	8.00
Mar.	18.	P. H. McCarthy	8.00
Apr.	30.	Capt. Wilson	14.96
Sept.	14.	P. F. McCarthy	8.00
Nov.	8.	J. Crichton	24.00
Dec.	22.	Major Grant	30.00
1912.			
Jan.	4.	P. H. McCarthy	8.00
Mar.	4.	Major Grant	24.00
May	31.	P. F. McCarthy	8.00
		W. J. Hardy	16.00
June	25.	Capt. Lewis	20.00
Aug.	31.	J. B. Twigg	9.50
Oct.	31.	A. H. Freund	4.75
Nov.	30.	P. F. McCarthy	8.00
1913.			
Jan.	31.	J. Twigg	4.75
		P. H. McCarthy	8.00

[577—521]

Referring to certain names in this list, the customs service has an assistant weigher by the name of D. Finnigan. There is an H. E. Farmer, who was chief clerk in the collector's office of the custom-house when Collector Stratton was there.

(Mr. Roche here made the following statement:
 "P. H. McCarthy is the person referred to by Mr.

(Testimony of W. H. Tidwell.)

Chisholm yesterday as the individual connected with the treasurer's office of the Pacific Mail. I want to make that statement so there will not be any confusion about the name.'')

A. H. Freund is an assistant weigher at the present time. I only know Harnett by hearsay, as connected with the Toyo Kisen Kaisha. Roundy was an assistant weigher, but he is now dead. Crichton is connected with the Toyo Kisen Kaisha. Major Grant was formerly assistant to Major Young, of the army transport service. Twigg is an assistant weigher at the present time, or is an acting deputy collector, assigned to the subport of Oakland. I have examined this donation account. My recollection is that in this memorandum, from which this is copied, I set forth the name of Mr. Chisholm in every instance in which it appears. I was present at the time Mr. Chisholm testified here the other day. My recollection is that his name did not appear in the book any more frequently than it appears in this statement, notwithstanding his testimony.

(The above copy of an extract from the donation account was here marked "U. S. Exhibit No. 136.")

(At this point the jury was excused while counsel argued before the Court the admissibility of any evidence of alleged donations by the Western Fuel Company or its [578—522] officers to engineers of the Toyo Kisen Kaisha—Japanese Steamship Company.)

On further investigation of my records I find that the date on which I advised the collector of the port

(Testimony of W. H. Tidwell.)

to refuse to permit the officers of the Western Fuel Company to examine certain records located at the custom-house was July 24th instead of, as I have previously testified, June 24th. A certain disagreement that I had with Collector Stratton fixes the date in my mind. If Mr. Sullivan and Mr. Roche were appointed special prosecutors in this case early in July, then said above mentioned refusal occurred after said appointment.

Q. Now, your attention was directed yesterday afternoon by Mr. McCutchen, to several entries contained in Exhibit "C" concerning which you have already testified and which upon cross-examination after a comparison having been made between Mr. Mills' books and Table C, you said that while the overages were correct the percentages were not correct. Now, you are familiar, are you, with the entry appearing upon page 2 of Table C, referring to the barge "Theobold." A. On page 2?

Q. Page 2, yes, under date of January, 1906.

Mr. McCUTCHEN.—January 31st?

A. Yes, January 31st, the "Theobold" appears.

Mr. ROCHE.—Q. According to your table, how many tons were checked into that barge, and how many tons discharged from the barge?

A. 1,524 tons, 1,580 lbs. were checked into the barge and 1,668 tons, 1,606 lbs. checked out of the barge, 144 tons, 26 lbs. more [579—523] than was checked into her.

Q. That overage would be approximately what percentage of the entire coal laden or checked into the

(Testimony of W. H. Tidwell.)

barge, just approximately? A. About 9.

Q. About 9 per cent? A. Yes.

Q. Now, is there any inaccuracy either so far as tonnage is concerned or percentage in that tabulation as compared with the books of the defendant Mills?

A. The first coal which he appears to have received is on January 17th, 827 tons, 870 lbs., the coal being received from the steamer "Tellus."

(The witness here traced receipts and discharges of coal on said barge "Theobold" from January 19th to January 21st, showing an overage of 144 tons and 26 pounds.

Counsel for the prosecution at this point gave to counsel for the defendants references to five other entries in the Mills' diaries, where the tonnage and percentage of overage agreed with the tabulation in Table C.

The attention of the witness was here directed to the statement compiled by him and hereinbefore referred to, being a list of alleged donations by the Western Fuel Company, made by the witness from certain vouchers in the possession of that company.)

Directing my attention to the month of December, 1907, I would say that I did find a voucher of that date showing "Custom Weigher del. coal \$13." No other explanation is found. [580—524] The name of the weigher did not appear upon the voucher. Under date of January, 1908, there is an item on the list or statement amounting to \$107. The voucher corresponding thereto discloses Christmas donations

(Testimony of W. H. Tidwell.)

to the mail dock. There is no other explanation. The amount of the voucher is \$150. During the month of December, 1908, there is a voucher for Pacific Mail donations, Chisholm, \$70; Wilson, \$25; Parks, \$20; Blake, \$10; and Dunn, \$20. It is my understanding that the Parks referred to there was the chief weigher of the Pacific Mail Steamship Company. There were certain vouchers examined by me and included in this list or statement which I have compiled which do not disclose upon their face the purpose for which the money was expended; that is, for instance, there are vouchers in which amounts are charged to gross earnings and rebates, without any other explanation. Under date of August, 1909, there is an item which reads, "Commandante Mare Island Navy Yard, \$50." There is no tag or voucher. There is another item under date of March, 1910, which reads, "Commandante Mare Island Navy Yard, \$100," which appears in one of the accounts. In the month of April I found a voucher or statement entitled, "Special Expense Auth., by J. B. S., Signed by D. E. N., \$100." I think the D. E. N. applies to Mr. Norcross, secretary of the Western Fuel Company, and I presume the J. B. S. applies to Mr. J. B. Smith, the general manager. There are other accounts or vouchers, entitled, "Donations charged to general expense."

(It was at this point admitted by counsel for the defendants that the Pacific Mail Steamship Company paid the Western Fuel Company the price charged by the latter for coal supplied to the former

(Testimony of W. H. Tidwell.)

upon [581—525] the weights of the coal as checked out of the barges. In other words, it was admitted that the Pacific Mail Steamship Company paid for the coal on the custom-house weights.

Referring to steamers generally, apart from the Pacific Mail steamers, it was also admitted that a bill was rendered after coal was delivered by a barge to a steamer in the bay, the bill being based upon the weights of coal taken as the coal was delivered over the side of the barge into the ship.

Admitted also by counsel for the defendants that in so far as steamship companies are concerned, who present draw back claims against the United States, they paid upon the out-turn weight, which, of course, was the custom-house weight.)

Further Recross-examination by Mr. McCUTCHEN
and Mr. MOORE.

I think there are some donations to charities in the donation account; that is, the donation account generally apart from the list which I have prepared. Whether the majority in amount of money shown to have been donated was donated to charitable organizations, or not, I don't know, because I did not foot up the entire account and deduct from it the amount which appeared to have been donated to charities. It is true that the names are stated in full of various charitable institutions. I cannot even say whether a large proportion of the names on the donation account are the names of [582—526] charitable institutions. There are a number of such institutions in the donation account. There are people in that

(Testimony of W. H. Tidwell.)

account who are neither employees of the Pacific Mail nor of the Government nor of any body else. There are names of individuals as well as of institutions.

I cannot say how long it was before July 24th, being the date upon which I requested the collector of the port to deny to the Western Fuel Company access to the custom-house records, that I met Mr. Olney in the hall of the custom-house, and went with him to the office of the surveyor of the port, I do not recall whether it is a fact that it was during the administration of John L. McNab, as United States District Attorney. I do not recall any document that I had asked for from the Western Fuel Company and been refused at the time of that meeting with Mr. Olney, except the one document which I recited yesterday in which the matter was finally taken up with Mr. Olney. Mr. Olney was then asking to see the records. I do not know whether the matter was said by the surveyor of port to be in my hands and in those of Mr. McNab's. The surveyor of the port at the time was Mr. McKinlay.

Q. In response to questions put to you yesterday by Mr. Roche, Mr. Tidwell, you testified that the total of the barge overrun so far as tonnage was concerned, remained unaffected by the discoveries of these inaccuracies in Mr. Mills' books, did you not?

A. I think that was in reply to a question of Mr. Olney, if I remember correctly, but later we found where there was a difference, there might be some difference and there might not; at the present time I

(Testimony of W. H. Tidwell.)

would be unable to say without going over every item.
[583—527]

Q. Well, at the present time you find yourself unable to answer definitely with respect to that?

A. Yes, but my opinion is, if I may express that, that there would be little change, if any.

Q. There would be little change, if any, so far as the total of the overrun was concerned as measured in tons; is that correct? A. Yes, sir.

Q. The only change that would take place would be with respect to the quantity of coal which was laden into the barge, according to your present opinion; is that correct?

A. That appears to be true.

Q. So that the matter would be one of reduction of percentage of the overrun rather than a reduction of the overrun as measured in tons? A. Yes, sir.

Q. Now, then, the fact of the matter is, is it not, Mr. Tidwell, that it don't make much difference what Mr. Mills credits those barges as having received so far as the question of these overages is concerned?

A. I don't exactly catch the meaning of your question.

Q. Well, I will put it this way: In getting the overrun, the grand total overrun, you take, do you not, the total quantity of coal sold by the Western Fuel Company from April 1st, 1906, to December 31, 1912, together with the amount on hand at that date, and which approximates 2,200,000 tons, do you not; you take that as one of your figures? A. For what?

Q. To get your total of overrun?

(Testimony of W. H. Tidwell.)

A. Of the barges?

Q. No, the whole business. A. Yes, sir.

Q. Now, then, from that 2,200,000, representing the total [584—528] sales during that period, with the amount on hand at the end of it, you subtract the custom-house weights, do you not?

A. Yes, the custom-house weights, and on the amount on hand on April 1st, 1906.

Q. You subtract the custom-house weights and the amount on hand on April 1st, 1906, and you get in the neighborhood of 62,000 tons, do you not?

A. Yes, sir.

Q. Now, when I say you subtract the custom-house weights from that 2,200,000 tons, I am not referring to the custom-house weights of coal delivered out of the barges while the barges are coaling vessels; you understand that, do you not? Do you follow me there, Mr. Tidwell?

A. No, I don't believe I do, Mr. Moore. I would like to have the question read. (Question repeated by the reporter.) I still don't understand the question.

Q. This is the proposition; probably I did not make myself clear; I will try and put it in a different way. The grand total overage you say you obtained by subtracting from the total of sales the amount on hand; that is to say, from 2,200,000 tons, you subtract the custom-house weights and the amount on hand on April 1st, 1906, do you not? A. That is true.

Q. And thereby you arrive at a difference of approximately 62,000 tons, as I understand you?

(Testimony of W. H. Tidwell.)

A. That is correct.

Q. The custom-house weights you subtract, together with the amount on hand on April 1st, 1906, or the incoming weights on the imported coal; that is, the out-turn weight of vessels importing coal here; is not that correct?

A. And on which duty was paid. [585—529]

Q. And the custom-house weights that you have reference to are the weights that are made by the custom-house weighers on the arrival of the coal upon its importation, are they not? A. Yes.

* * * * *

Mr. STANLEY MOORE.—Q. When you make that subtraction, Mr. Tidwell, what have you got, adding together the amount on hand on April 1st, 1906, and the custom-house weights from April 1st, 1906, to December 31, 1912, what is the particular sum that you get by that computation?

A. Approximately 62,000 tons.

Q. No, no, I am speaking now of the sum total of the amount on hand April 1, 1906, which you testified to according to the books of the company was about 25,000 tons, added to these custom-house weights throughout that period from April 1st, 1906, to December 31, 1912?

A. Oh, I think I understand you now; you mean the amount on hand subtracted from the amount received between those dates; is that what you mean?

Q. It ought to be added to the amount received.

A. I understood you to say the difference between them.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Counsel is trying to find out not the difference between but the total received plus the coal on hand April 1, 1906.

A. That is shown by Exhibit "A."

Mr. STANLEY MOORE.—Q. And you got it in the neighborhood of 2,140,000 and some odd tons, did you not?

A. 2,138,000 and something, I think it was.

Q. Very well, 2,138,000 tons.

A. I think that is approximately correct.

Q. There were 25,000 tons on hand April 1, 1906, and therefort [586—530] this difference of 2,138,000 tons less 25,000 tons represents the out-turn weight of the coal upon its importation here, does it not,—the out-turn custom-house weights?

A. Since that date, since April 1st, 1906.

Q. And it is made up in large part at least of the out-turn custom-house weight as represented and registered by the scales upon the Folsom Street bunkers, to which place, according to your testimony a large proportion at least of this coal was landed; that is correct, is it not? A. That is correct.

Q. That 62,00 tons gives you the overage, does it not irrespective of the amounts that Mr. Mills may or may not have charged as having been loaded into the barges?

A. That represents the difference between the total receipts and the total sales without taking into consideration the books of Mr. Mills.

Mr. ROCHE.—We concede that.

Mr. STANLEY MOORE.—Well, never mind, Mr.

(Testimony of W. H. Tidwell.)

Roche, we want the witness to concede it, too.

Q. That figure is interdependent so to speak, has no reference to the amount that Mr. Mills says—I mean it is independent,—that figure of 62,000 tons is independent of any amount or amounts that Mr. Mills notes down as having been received into the barges, is it not?

A. I don't know that I fully grasp your question, Mr. Moore. It is rather difficult. It is not absolutely independent for the reason that this barge overage is simply a part of that 62,000 tons overage.

* * * * *

Q. Is not this the fact, and is it not appreciated by you, that the overage is obtained—the total overage is obtained— [587—531] by subtracting from the amount of coal on hand and received according to the custom-house weights on importation here, by subtracting that amount from the total sales during the same period, taking into consideration in addition the coal on hand at the end of that period?

* * * * *

A. That is true. I have answered it several times, not only to-day but before.

Q. Would it make any difference so far as that overage is concerned, the 62,000 tons total overage, whether Mr. Mills had made any entries respecting the quantities of coal that were purported to be loaded into the barges?

A. Well, previous to answering the question, Mr. Moore, I would like to ask you whether—

Q. (Intg.) Can't you answer that yes or no, Mr.

(Testimony of W. H. Tidwell.)

Tidwell and then make your explanation?

A. No, I would prefer to ask a question about it first. You say independent. Do you mean by that if the coal which was laden on the barges had not been disposed of in any manner whatever but had remained in the property of the company?

Q. Certainly not. I am talking about the quantities of coal tht Mr. Mills put down—that he put down or did not put down as being loaded into the barges. I am trying to develop the immateriality of the figures as to what went into the barges.

A. Well, as to the amount received and the amount sold, the aggregate amount received and the aggregate amount sold—is that it?

Q. I am trying to develop, Mr. Tidwell, if I can make it clear, that it does not make any difference what went—

A. (Intg.) And I asked the question there only for information, Mr. Moore. [588—532]

Q. Well, what is the question?

A. I asked you did you mean the aggregate amount received and the aggregate amount sold?

Q. Of course, Mr. Tidwell, I am talking about the amount received. There was coal sold out of the barges. Or to get at it this way, I will ask you—

A. (Intg.) I think I could answer it if you would answer my question first.

Q. Well, I am talking, Mr. Tidwell, about the amount received into the barge, whether it makes any difference whether Mr. Mills put that down at all, or not, or what his figures are, so far as the

(Testimony of W. H. Tidwell.)

amount that he says was laden into the barges, or which those books purport to state were laden into the barges is concerned.

A. Those figures have absolutely nothing to do with the difference obtained between the amount sold and the amount received, they have no connection whatever with those particular figures, but the 33,000 tons overage which is shown by those books, or 43,000 tons overage, which is shown by the two receipts, evidently a part of that 62,00 tons—we can increase that now to 72,000 tons, because there are 10,000 tons back in 1904 and 1905, making a total of 72,000 tons.

Q. Mr. Tidwell, I was not talking about that; that is, assuming that Mr. Mills did put down and that he accurately put down all of the coal that went into the barges. I am talking now not about the barge overrun as it may purport to be represented accurately or inaccurately by the incoming weights in the Mills' books—

A. (Intg.) I did not refer to the accuracy or the inaccuracy of it. [589—533]

Q. No, I understand that, Mr. Tidwell, but I am talking about the total overrun in the business of this company, and I ask you again, is that affected in any way or dependent in any manner upon what Mills wrote down as going into those barges, or upon the fact as to whether he wrote down anything in that regard as having been laden into the barges?

Q. If the coal were sold, it is absolutely independent of it.

Q. If the coal were sold there is no occasion or

(Testimony of W. H. Tidwell.)

necessity so far as figuring the overrun is concerned for Mr. Mills to have written down anything as being the amount of coal which went into those barges?

A. Mr. Mills' books represent part of the sales of coal, show part of the sales of coal and the vessels to which the coal was delivered.

Q. Yes, but I am talking about a part of Mr. Mills' books which—

A. (Intg.) I don't think, Mr. Moore, we can entirely divorce Mr. Mills' books from the sale of coal, because they are a part of it.

Q. We will get at it this way: Just imagine for a moment that you never have laid eyes on Mr. Mills' books, that you never have seen them; could you not have figured out and would you not have figured out the total overrun of coal in the business of this company as being 62,000 tons without ever having seen or referred to Mr. Mills' books?

A. There is no question about that at all, because that overrun was not considered in taking the two amounts, the amounts sold and the amount received.

Q. And that overrun on the whole of the business done by the company, including sales in every direction, those as to which [590—534] deliveries were made to the sides of vessels through the barges, those as to which deliveries were made by being loaded upon coal wagons in this city and those as to which deliveries were made by the railroad trains, is 2.8 per cent only in excess of the out-turn custom-house weights upon the importation of the coal; is not that the fact?

(Testimony of W. H. Tidwell.)

A. That is approximately correct.

Q. Now, Mr. Tidwell, coming to your barge over-run—

A. (Intg.) Just one moment, Mr. Moore; that amount, you will understand, does not apply to the vessels where there was a difference in tonnage; for instance, where there was a short and over, but that is the total amount of coal received to the total amount of coal sold; in many, many instances in this record the invoice weights and the out-turn weights are exactly the same; the largest one item that I remember is a purchase from the Central Coal Company of some 18,000 tons; it appears on the record as invoice weight, 18,000 odd tons—I don't remember the exact figure—and the same amount appearing under the ascertained weight or the out-turn weight. Consequently the percentage is lowered in that manner.

Q. Now, you state, Mr. Tidwell, that there are many, many instances of that kind, but you have never furnished us with any table at least, or introduced any table in connection with your evidence here which does show the number of instances of that kind? A. It is shown in Table A.

Q. You say it is shown in Table A?

A. Yes, sir.

Q. You mean it is shown in Table A if a man goes over the whole of that table and segregates those instances? A. Yes, sir.

Q. Have you done that? A. No.

Q. You don't know how many those instances are,

(Testimony of W. H. Tidwell.)

as a matter of [591—535] fact, do you?

A. Wait a moment—yes, I believe there is something in evidence to that effect, I think there is.

Q. What table is that?

A. I don't know the exhibit, but I think it is in evidence.

* * * * *

Q. What proportion is shown in that table of cargoes of that kind?

A. I don't recall at the present time. I think the evidence will show it there. I recall counting up the overs and the shorts during this period and I think there were 324 shorts and 120 overs; the percentage of shorts I think was 72, and the overs 28.

Q. And when you got your difference between the invoice weights and the custom-house weights your final difference was arrived at by adding up the extent of the overs—those cargoes that had run over the invoice weight, making a total out of that and then adding up the extent of the shorts and making a total out of that and then subtracting the overs from the shorts which gave you a new figure of 20,700 tons; is not that right?

A. That is approximately correct.

Q. And that 20,700 tons represented on the invoice weights a shortage of nine-tenths of one per cent, did it not?

A. That is the total amount received, but not on the cargoes on which there was a difference.

Q. Not on the cargoes you mean where part of it was consigned to the Western Fuel Company?

(Testimony of W. H. Tidwell.)

A. No, I don't mean that at all; I mean where there was a short or an over.

Q. Yes; that was the result that you got where you took into [592—536] consideration both cargoes that were short and cargoes that were over, was it not?

A. No, sir; in other words I have figured—

Q. (Intg.) Are you clear on that, Mr. Tidwell?

A. Yes, I am clear on it. Your nine-tenths of one per cent is the percentage of the total amount received, 2,138,000, to 20,700.

Mr. ROCHE.—Which included the partial cargoes?

The WITNESS.—Yes, which includes the partial cargoes; whereas, the percentage of cargoes where there was a difference, say 144 cargoes, I think that is the number, it will be materially changed. And I think that also is in evidence.

Mr. STANLEY MOORE.—Q. Then coming back to the nine-tenths of one per cent, Mr. Tidwell, that is the final general figure that is arrived at by taking into consideration all of the cargoes, split cargoes, cargoes as to which there is an overrun, and cargoes as to which there is a shortage, but in the instance of split cargoes figuring the invoice weight, in the instance of split cargoes not figuring any discrepancy from the invoice weight,—I say that is the final general result that you obtain, is it not, 20,700 tons?

* * * * *

Mr. STANLEY MOORE.—Q. Approximately the percentage; that is, 20,700 tons, or nine-tenths of one

(Testimony of W. H. Tidwell.)

per cent. Now, you say you took cargoes and made a table by itself, a separate table relating to short-ages, did you not?

A. I think that is in evidence. That is my remembrance.

Q. What is the percentage there? You have mentioned that, Mr. Tidwell, and that is the only reason I am going into it.

A. No, I have not mentioned the percentage.

Q. Well, I will ask you to mention the percentage.

[593—537]

A. I don't just recall what it is.

Q. It is under 2 per cent, is it not?

A. I think it is.

Q. Mr. McCutchen tells me that you said it was 1.8 per cent, taking the short cargoes in a class by themselves and making a separate table with respect to them?

A. As I remember it, it is 1.84 per cent, since you have refreshed my memory on it to some extent.

Q. We will go back to the barge overrun you mentioned awhile back as being 33,000 tons.

A. That is, from 1906 to 1912.

Q. Yes; and it was during that same period that you derived this excess of 20,700 tons representing the difference between the invoice weights and the out-turn weights, is it not, the same period as you got the 33,000 tons barge overrun?

A. Yes, approximately the same period. I think the exhibit as to the barge overrun only runs up to November 20th, I think it is.

(Testimony of W. H. Tidwell.)

Q. Well, it is practically the same period.

A. It is approximately the same period.

Q. It is seven years, with the exception of a divergence of one and one-half months, or something like that?

A. Yes, sir.

Q. You indicated here the other day, Mr. Tidwell, that so far as coal actually weighed was concerned that that was all right and therefore you considered that the coal that went into the offshore bunkers was correctly weighed; your theory in that regard was, or you indicated in that regard, if you meant to indicate anything, that there might be coal that went into the inshore bunkers that was not weighed at all. Did you not [594—538] intend to give some such indication as that?

A. Yes; I stated that that was my information.

* * * * *

Mr. STANLEY MOORE.—Q. Now, I will ask you this question, Mr. Tidwell; it was from the offshore bunkers that the coal was obtained in the greatest part according to your information that was laden into the barges and afterwards found its way into these vessels to be there used for fuel purposes, that coal I say came in greater part according to your information from the offshore bunkers, did it not?

A. That is my information.

Q. And you figure an overage, an actual overage, as I understand you, of 33,000 tons with respect to those barges, do you not?

* * * * *

A. Yes, sir.

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—Now, Mr. Tidwell, if you take the invoice weights, and in view of the claim here or the statement of the theory made by Mr. Roche the other day that the invoice weights contain actually at least as much coal as was laden into the vessels, you testified then the company's actual overrun would be on the whole of its business 41,000 tons, did you not?

* * * * *

A. Yes, sir.

Q. Well, is it 41,000 tons?

A. Whatever the figure is; it is the difference between 2,200,000 and 2,159,000; it is approximately 41,000. As I stated before, so far as the actual overage is concerned of 62,000 tons, that was obtained from the difference between the amount sold and the amount received. The question of the treatment of receipts and sales from the barges and the overage from the barges was an entirely separate and distinct transaction.

Q. Well, then, if there was an actual overage which according to your theory there was with respect to the barge business of 33,000 tons, there was only an actual overage of 8,000 tons if the invoice weights correctly [595—539] represent the amount of coal on all the rest of the business transacted by the company during that seven years, was there not?

* * * * *

The COURT.—Well, that is a matter of subtracting 33,000 from 41,000.

Mr. STANLEY MOORE.—Yes, your Honor, but

(Testimony of W. H. Tidwell.)

I cannot get him to do it.

The COURT.—Then let us do it if he is unwilling to. The difference is 8,000.

The WITNESS.—I intended to answer it that way. I saw what he was driving at there.

Mr. STANLEY MOORE.—Q. Then you have figured up a total of sales out of the barge department of the business, if we may term it that, of about 569,000 tons, have you not, on which you derive this overage of 33,000?

A. I should say approximately that amount.

Q. But you have not, even according to 'Mr. Mills' books that seem to be inaccurate in themselves, credited those barges with coal that even Mills had down in his books as going into them, have you, in arriving at that figure of 569,000 tons?

A. It appears not.

Further Redirect Examination of Mr. ROCHE.

In order to reduce this general overage of 41,000 tons, it would have to be conceded that the invoice weights showing importations of coal were correct, and that the ascertained or custom-house weights were incorrect and fraudulent. [596—540]

[**Testimony of Michael J. Costello, for the Government.**]

MICHAEL J. COSTELLO, a witness called for the United States and sworn, testified as follows:

I live in San Francisco, and have for ten years been in the Government employ as Inspector of Customs. I was for eight years a bookkeeper before I entered the customs service, so that I am familiar

(Testimony of Michael J. Costello.)

to some extent with bookkeeping and methods thereof. I am familiar with the dock books or diaries of the defendant Mills which have been introduced in evidence in this case, and have been familiar with them for the last two or three weeks. At the request of Mr. Tidwell and of counsel for the Government, I have, within the past few days, made an examination of all those books, with other parties, for the purpose of determining in how many instances, according to those records, a shortage appeared upon the barge or barges referred to in said books at the time of clearance. I made that examination with Mr. Atkinson and Mr. Tidwell. After the examination was made the figures which were put down showing these shortages were checked for the purpose of ascertaining whether they accurately set forth the number of shortages which appeared from time to time in said books of the defendant Mills. I made a tabulation showing the instances where such shortages appeared and the amount thereof according to the Mills records. I also made a calculation showing the total quantity of coal representing the aggregate amount of shortage appearing upon those barges, according to said Mills' records, between January 1, 1904, and December 31, 1913. I am familiar with the various tables that have been introduced in evidence by the United States, including Table C, introduced in evidence as part of United States Exhibit 125. I am also familiar in a general [597—541] way with the supplementary tables covering the years 1904 and

(Testimony of Michael J. Costello.)

1905. The calculation or table which I prepared showing these shortages covers 1904 and 1905, and the period between January 1, 1906, and December 31, 1912. The document now shown me is the document which I made, and to which I refer. With the exception of one or two minor instances where Mr. Mills' figures were slightly inaccurate, and where I had to change them to strike a balance. I have, however, put upon that table both Mr. Mills' figures and the corrected figure. This document correctly sets forth every instance during the period January 1, 1904, to December 31, 1912, when a shortage would occur upon these barges at the time of clearance. The first inaccuracy which I found in the Mills' books was with reference to the barge "Energy," under date of April 17, 1906. His books show the shortage to be 8 tons, 1680 pounds, whereas in truth the figure was 8 tons, 1620 pounds. The second inaccuracy relates to the barge "Solano," under date of January 15th, 1910, Mr. Mills' shortage being 6 tons, 1388 pounds, and the correct figure being 6 tons, 1414 pounds. The total amount of coal laden upon these barges from time to time, when a shortage would appear as the result of the clearance of these barges, amounts to 14,471 tons, 677 pounds, according to the records kept by Mills and the total weight of the coal discharged from those barges according to his record, including these two corrections amounts to 14,168 tons, 1978 pounds, making the total shortage during this entire period of time from January 1, 1904, to December 31, 1912, of 282 tons,

(Testimony of Michael J. Costello.)

939 pounds. The total amount of coal laden and checked upon these barges during the period referred to amounts to 33,305 tons, 862 pounds. The total coal discharged from the barges during the same period, according to Mr. Mills' records, amount to 32,281 tons, 695 pounds, the total shortage being 524 tons, 167 pounds.

(The table prepared by the witness and above explained was here introduced in evidence as "United States Exhibit No. 137.")

(It was here agreed by counsel for the defendants that that portion of the minutes of the Western Fuel Company showing the proceedings had [598—542] during each meeting of the board of directors from January 1, 1904, to and including December 31, 1912, relating to the reading and submission of the monthly coal statements might be considered to be introduced and read in evidence, with the exception of those portions which had been already read in evidence. In answer to the question what was meant by coal statements, counsel for the prosecution stated that they desired to introduce in evidence the language used in the minutes themselves, leaving the jury to determine what they referred to.

It was also here agreed by counsel for the defendants that that portion of the minutes of the meeting of the board of directors of date March 25th, 1907, during the course of which the salaries of the president and the vice-president of the Western Fuel Company were increased to \$1500 per month, and at which meeting a dividend, No. 14, of $2\frac{1}{2}\%$ was declared, might be considered as read.) [599—543]

[Testimony of Harry Cooper, for the Government.]

HARRY COOPER, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live now and have lived since about February, 1905, in Alameda, California. For about forty years prior thereto I resided at the Nanaimo coal mines. I was employed there from 1902 to 1905 with the Western Fuel Company, until two or three months before I left, in the capacity first as dock-master and ultimately as weigher. I was also at one time harbor-master for five or six years. My period of employment at Nanaimo with the Western Fuel Company ran, as I have said, from 1902 to 1905; and before 1902, in fact since 1862, I was connected with the plant which the Western Fuel Company later acquired. The company that owned the properties at Nanaimo before the Western Fuel Company came in was the Vancouver Coal Company.

I am familiar with the location of the mines at Nanaimo. They had a Fairbanks scales there. I am also familiar with the docks and the bunkers. The bunkers were located upon the docks, or rather close to the docks, on a grade lower. I don't remember clearly, but I think the scale-house was about one hundred yards away from the docks.

I was first employed by the Western Fuel Company as dock-master, but in less than a year I became master weigher, and remained in the latter capacity until a short time before I left. When I was dock-master

(Testimony of Harry Cooper.)

I frequently entered the scales-house. As master weigher I had to see all the coal weighed, and my station would be in the weigher-house. The practice was to bring the coal from the mine, weigh it and [600—544] then dump it into the bunkers. During the entire time I was employed by the Western Fuel Company I never saw a trainload or carload of coal taken from the mine and discharged into the bunkers or into a ship that was not weighed. The tare weight was painted on the sides of the car. Each car also had a separate number. Tare weights were taken frequently—I should say three or four times a year. Record was kept of the scale-house very particularly on separate papers for each ship, and for the local or other trade; of every day's output of coal, and of the weight thereof, and of the kind of coal. The weights were taken upon a rising beam. These were called fair weights. I never saw any coal dumped either into bunkers or ship which was not in fact weighed first. Sometimes there would be as many as three ships loading at a time. In such case the Western Fuel Company maintained men on the wharf who had check-books in which were entered the number of every car and the boat into which such car would be discharged. One such checker ordinarily looked after several vessels, because the three wharves were not very far apart. The check-books or records would then be returned to the office. The cars were drawn from mine to scales, and from scales to bunkers or ship, by a locomotive; but at the wharf there was a self-acting machine that pulled the cars one

(Testimony of Harry Cooper.)

by one and dumped them into the chutes. Instructions were telephoned from the office to the wharf as to what ship such and such cars should be dumped into; or sometimes the instructions would be given to the locomotive man at the scale-house. Then they would check up at the wharf, and the figures would be compared. When a vessel was actually at the wharf they would load the coal directly into her. The bunkers contained pockets; and when coal was being discharged into the bunkers, a record would be [601—545] kept of each car and of the particular pocket into which it was discharged. The weigher would have the weight of that car at the scales-house. It is not, however, a fact that the Western Fuel Company office at Nanaimo knew the exact quantity of coal contained in each pocket. There were many pockets, but they all ran into one; you could take $\frac{2}{3}$ of the coal out of any other pocket; they were not separate bunkers; there were twenty holes or pockets; twenty cars could load at a time, but it was all one bunker, but they were all dumped into separate places. When coal was taken from the bunker into a ship it was weighed again, first being taken back to the scales-house and weighed and eventually returned to the dock and the ship when it would be discharged directly from the cars on to the ship. That was the system pursued during the time I was employed by the Western Fuel Company. Invoices were frequently sent to the American consular officials for certification in order to clear the vessel, and bills of lading would be issued to be signed by the master of

(Testimony of Harry Cooper.)

the vessel. Upon those occasions the invoice weight would be filled in by one of the office clerks, and such invoice weight would represent the actual scale weight of the coal. Such weight was kept by fives and tens in pounds.

**[Testimony of W. H. Tidwell, for the Government
(Recalled—Cross-examination).]**

W. H. TIDWELL, recalled on cross-examination, testified as follows:

I stated this morning that on examining the books and vouchers of the Western Fuel Company I found vouchers drawn to the commandant at Mare Island. I placed the commandant's name in the list which was used this morning. This list is extracts from various vouchers which were found among the vouchers of the Western Fuel Company, does not say whether the vouchers represent a donation or not. I [602—546] did not know that the commandant at Mare Island is always a rear-admiral of the navy. I made the list which was presented this morning for just exactly what it represents. I did not give my testimony here for the purpose of creating the impression that the Western Fuel Company had bribed the commandant at Mare Island. The first item on this list to said commandant is \$100, of date March 12th, 1910.

(Counsel for defendants here read in evidence the following communication:)

(Testimony of W. H. Tidwell.)

“United States Navy Yard,

“Mare Island, Cal., September 9, 1910.

“Gentlemen: There is enclosed herewith San Francisco Check #94012 for \$50.09, being the balance of your Special Deposit for cost of teaming coal, as per following statement:

“Deposited Feby. 14.....\$ 50.00

March 12..... 100.00

150.00

“Charges, labor and material, Feby.

March, Apr., May, June..... 99.91

“Balance..... 50.09

“Respectfully,

“C. M. RAY,

“Pay Director, U. S. N., Paymaster of the Yard.

“Western Fuel Co., 430 California St.,

“San Francisco, Calif.”

It was thereupon conceded by counsel for defendants that this correspondence was not turned over to the prosecution and that the prosecution never had it.

In August, 1909, another item of \$50 appears against the commandant at Mare Island.

(Counsel for defendants then read in evidence the following three papers:)

“United States Navy Yard.

“Mare Island, Cal.,

“Special Deposits: Western Fuel Co.

“September 2, 1910.

“Sir: Replying to your letter of August 27, I sub-

mit the following statement of your account. [603—
547]

Deposited	\$150.00
Cost of work,	
Labor	\$52.33
Tool charges.....	17.57
Indirect.....	30.01
	<hr/>
	\$99.91

Balance.....\$ 50.09

“Very respectfully,

“J. S. COLLINS,

“P. A. Paymaster, U. S. N., Accounting Officer.

“Western Fuel Company, San Francisco, Cal.”

“Navy Yard, Mare Island, California.

“Feby. 14, 1910.

“\$50.00.

“Received from the Western Fuel Company, through the Commandant, certified check No. 2319, dated Feby. 11, 1910, on the First National Bank, San Francisco, for Fifty Dollars, (\$50.00), as a special deposit to cover cost of work to be performed in hauling coal under contract No. 17, Navy Pay Office, San Francisco, from the water front to the officers’ quarters at this Yard.

“C. M. RAY,

“Pay Director, U. S. N., Paymaster of the Yard.

“J. Western Fuel Co.”

“Navy Yard, Mare Island, Calif.

“March 12, 1910.

“\$100.00

(Testimony of David G. Powers.)

“Received from the Western Fuel Co., through the Commandant, certified check No. 2427, dated March 9, 1910, drawn by the Treasurer, Western Fuel Co., on the First National Bank, San Francisco, for the sum of One Hundred Dollars, as a special deposit to cover cost of work to be performed in hauling coal under Contract No. 17, Navy Pay Office, from [604—548] the water front to the officers’ quarters at this Yard.

“C. M. RAY,

“Pay Director, U. S. N., Paymaster of the Yard.

“The Western Fuel Co. R.”

(Counsel for defendants, in reply to a question of the prosecution then stated that they did not know whether or not they had in their possession anything explaining any of the other items to which the witness had testified as having been on the Western Fuel Company’s donation account.)

[Testimony of David G. Powers, for the Government.]

DAVID G. POWERS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I have lived in San Francisco since my birth. I was at one time employed by the Western Fuel Company, and before that by the defendant Mills by whom I was first employed on September 10, 1902. Immediately prior to that I was in school, except that I had worked for a very short time in the Risdon Iron Works. Defendant Mills had his office at Mis-

(Testimony of David G. Powers.)

sion No. 2. He also had an office on California St. at the office of the Western Fuel Company. He employed me as timekeeper for all outside steamers. Mr. Mills was at that time superintendent for the Western Fuel Company; but I worked for him personally, because, in addition to his superintendency, he was taking contracts on steamers to trim coal. I do not include in this statement steamers belonging to the Pacific Mail Steamship Company. I am referring to the vessels of the Oceanic Steamship Company, the American-Hawaiian Steamship Company and a lot of tramp steamers. By trimming [605—549] coal I mean leveling and adjusting coal in the bunkers of a vessel so that the bunkers may be thoroughly filled. The Western Fuel Company supplied coal to all of the vessels which Mr. Mills was trimming. From 1902 until 1904 I continued in this employment for Mr. Mills personally, doing no other work, but from 1904 until 1908 I was also employed by the Western Fuel Company in charge of the Pacific Mail Steamship Company's track and also kept time for Mr. Mills on his vessels. In my employment with Mr. Mills I visited all neighborhoods along the waterfront, and was around the dock and steamers from 6:30 in the morning until about 5:30 in the evening, checking the men when they went on in the morning and checking them off when they got through at night. I would also check them out at noon and back again after lunch. Between times I would have to lodge myself on the boats or in the vicinity of the boats or aboard the barges. At the

(Testimony of David G. Powers.)

times when the men were actually checked in and out, I would be stationed on the dock leading to the steamer. At other times I would go to Mr. Mills' office, or would walk around the track and see Mr. Mayer, the weigher. I would also occasionally go upon the barges. The superintendent in charge of the barges between 1902 and 1904 was Mr. Mills. Frank Wilson and his crowd of men were on the barges. Mr. Mayer, when I would see him, would be located on the track at Mission No. 2, occupied as weigher. The Western Fuel Company were not at that time in possession of Folsom Street dock. Mr. Mayer was mostly at Mission Street, but he would sometimes go to Green Street and other docks. The scale-house at Mission Street dock was located upon the track above the dock, but it was level with the track. The scale-house was away aft, that is, toward the end of the wharf at Mission Street. The weighers faced toward Oakland, so that their backs were to the discharge of coal. I visited the Mission Street docks [606—550] many times during these years 1902 to 1904. I was in Mr. Mill's office every day, and I might drop up to the track to see Mr. Mayer because we were very good friends. I observed the manner in which the coal was being discharged at Mission Street. I do not recall the exact time when the Western Fuel Company gave up the Mission Street dock.

During the two years 1902 to 1904, I observed the manner in which coal was being discharged from the barges into the boats. The method pursued by the

(Testimony of David G. Powers.)

Western Fuel Company in such discharge from barges to vessels was as follows: the tubs would go up about three-quarters full, and when they were being weighed they would be heaping full. All the steamers were loaded by buckets, and the weight by the bucket—the average weight was taken, and most of them from the barges—only a few were loaded from the docks direct. The barge would lie alongside the boat that she was about to coal, and the coal would be hoisted by the bucket load and dumped into the vessel above the bunkers. They had four tubs in the hold of each barge, and the tubs would be filled up and raised and dumped into the vessel. The custom-house weighers and the Pacific Mail Steamship Company weighers would take about three weights a day, and sometimes four or five, and then they would take an average and fill in the other weights and tally the tubs that went up during the day. The tubs in the barges were all numbered, 1, 2, 3 and 4, and said numbers would be painted on the tubs. The tubs were hoisted by an engine. They always went up in rotation, and there were two men to each tub. Sometimes, on the barge “Theobold,” which is a very fast barge, they would send up 120 tubs an hour. The net weight of the tubs on that barge was about from 1100 to 1120 pounds, Western Fuel weight. I often saw the boats coaled during the years 1902 [607—551] to 1904.

In 1904 I was employed by the Western Fuel Company as track-tender upon the Pacific Mail Dock. The dock was at the end of Brennan Street, but has

(Testimony of David G. Powers.)

since been destroyed; there is a new dock there now. The track on that dock was used to coal the steamers inshore; that is to say, they would coal these large vessels from both sides—on one side from the dock, and on the other side from the barge. My duties as track-tender during those years, 1904 to 1908, consisted in taking care of the track, and when the engineer was sick in running the hoist on the barges, and also occasionally in acting as assistant weigher to Mr. Mayer in the importation of coal at the Folsom Street dock. I was not employed steadily, but was paid by the day, and I did not work every day. I would be laid off when there was no ship in.

During that same period of time from 1904 to 1908 I was also, as I have heretofore said, performing services personally, as I had performed such services before 1904, for the defendant Mills. I was time-keeper for him. The Pacific Mail Steamship Company trimmed its own coal at that time. I kept time for him on outside steamers. Mr. Mills paid me personally for the services I rendered him, and the Western Fuel Company paid me for the services I rendered it. During those years I was almost every day upon the barges. The defendant Mayer had charge of the track-weighing of the incoming coal. The Western Fuel Company had no one checking the discharge of the coal on the barges except a Mr. Mendenhall, who was there for a short time. I know that Mr. Mayer had charge of all the track-weighing afterwards that is of all incoming coal. Mr. Mills was on the barges three or four times a day, and

(Testimony of David G. Powers.)

sometimes night and day. Mr. James B. Smith did not visit the barges very often, but he was at the [608—552] office of the defendant Mills between 8:30 and 9 o'clock every morning. I am referring now to the periods 1902 to 1904 and 1904 to 1908. James B. Smith had no dock office. After his morning visit Mr. Smith would sometimes but not every day (perhaps twice a week) drop back to the bunkers in the afternoon and stay an hour or two. He was all over. Referring again to the years 1904 to 1908, I several times worked at night. They would coal vessels at night. On such occasions when they were coaling vessels at the Pacific Mail dock, I would be stationed on the barges. The system of coaling vessels from barges during the years 1904 to 1908 was the same as that which I have previously described as pursued during the years 1902 to 1904. Some of the vessels had a hanging scale or rod scale, which is a scale that has a rod on it hanging down to the hold of the ship, and there is a hook at the end of the rod, to which the tub is attached; and when the tub comes up you pull the lever down, and the customs inspector is standing on the deck as the weight is taken. The part of the scales indicating the weight would be located above the hatch. The Government weigher would be stationed on the deck where he would see the weights. This type of scales was used on the "Nanaimo" and the barge "Comanche." The other barges had a scale that rested on a platform on the deck, and tubs would be hoisted up out of the hatches of the barges and placed upon the scale which was

(Testimony of David G. Powers.)

immediately over the hatchway. On the barges which were equipped with the rod or hanging scale it would not be necessary to wait a while and clear the barge out a little before taking the weights; but on the other barges like the "Wellington" or "Melrose" a delay of half an hour or an hour was sometimes necessary, because the well was filled up with coal, and they would have to clear the well out first. The platform [609—553] scales would run on wheels. It was the custom to take the weight of four buckets at a time; that is known as a round of buckets. When the customs weigher wanted to take a weight he would holler down to the hatch-tender, "On the scales." Then the hatch-tender would holler down to the eight men below in the hold of the barge. Then there would be a certain delay. It takes perhaps 15 minutes or 10 minutes to weigh the four tubs. The coal shovellers would go into the fine coal. One man would pick out the lumps and put them in the tubs, and the next man would shovel in the fine coal in order to fill in the vacant spaces, and then the four tubs would go on the scale one after the other, and be weighed. Some of the barges would throw in about 120 tubs an hour, that is, about 2 tubs a minute, 1120 lbs. net weight. They would weigh each tub separately, one after another. I should judge it would take $2\frac{1}{2}$ or 3 minutes to weigh each tub; and while the first tub was being weighed, the remaining three tubs still to be weighed would remain in the hold of the barge. The difference between the method pursued in taking coal out of the hold when

(Testimony of David G. Powers.)

a round of tubs was being weighed, and the method pursued in hoisting the tubs and discharging their contents into the boat was that when the buckets were being discharged into the steamer, they were going up about three-quarters full and there were about 120 tubs an hour, that is about two a minute, or 1120 lbs. net weight. I should judge that it took ten or perhaps fifteen minutes to weigh the four tubs, one after the other. When the first tub of a round of tubs was being weighed, the remaining three tubs would be down in the hold much longer than they would have remained there if weights were not being taken. On the barges which had platform scales, as distinguished from hanging scales, the hatch-tender always had to call two men out of the hold of the ship or barge to assist him in putting the tubs upon the scales when weights were being taken. The men would have to come up from the hold before even the first tub was weighed. This was not true of the barges "Wellington" and "Comanche," which had hanging scales. The hatch-tender always called out his order, "On the scales" in a loud tone of voice. I quite often in the years 1904 to 1908 was on the barge when this order was given, and would be near the hatchway while the tubs were being weighed. I would frequently [610—554] observe that after the cry "On the scales" had been given the coal shovellers would go right into the fine coal; one man would shovel in fine coal, and the other man would put in the lumps, I mean the fine coal to fill in the spaces, and they would fill the tub to overflowing and put it on the scales.

(Testimony of David G. Powers.)

During these four years, 1904 to 1908, I occasionally, but only occasionally, accompanied a barge over to the Folsom Street bunkers for the purpose of observing the barge loaded with coal. This was the method: They would discharge the coal from the bunkers into the barge through pockets; they would empty one pocket all out; the coal was discharged from the bunker through a conveyor right into the barge, and the conveyor would be located at the mouth of the pocket; they would drop the coal into one end of the barge amidships, by which I mean the center line of the barge, forward and backward. I mean that the "dead coal," or fine coal, or screenings, would drop amidships, while the lumps would roll off to one side or the other. After they had one end of the barge loaded they would shift the barge to the other end. It was a matter of indifference whether they loaded from aft forward, or from forward aft. The conveyor or funnel would be located directly over the center line of the barge; and, as I have said, the fine coal would drop straight down while the lump coal would roll off into the wings. That is true for the entire length of the barge.

Returning now to the Mail Dock, I would say that the fine coal, into which, as I have heretofore stated, the shovellers would go when the order "On the scales" was given, was located amidships, that is to say, along the center line of the barge. When coal was not being weighed the shovelers would [611—555] always try to get out the wing coal, the lump coal, first, taking only such fine coal as came along

(Testimony of David G. Powers.)

incidentally. There would be two tubs working forward and two working aft. When weights were not being taken a few lumps would be shoved into the buckets and a few shovels of fine coal, and they would go up about three-quarters full. As to the method in which the tubs were loaded, they were turned on their sides, and the coal scooped in, but when weights were taken they would shovel the coal into the tubs. When the tubs were not being weighed the coal was scooped into them, and they would go up half full. When the tubs were being weighed one shoveler would shovel in the fine coal and the other would throw in the lumps. That was an every day occurrence.

During those four years, 1904 to 1908, I did not see the defendant, Edward Smith, upon the barges. He came there, I think, in 1908.

During those four years, 1904 to 1908, I often visited both the Folsom street and the Mission street docks. I did not act as hatch-tender at all before 1908. I did not act as assistant weigher relieving the defendant Mayer upon either dock during those four years. When I visited the docks it sometimes happened that vessels were being discharged of imported coal. I often saw the defendant Mayer upon the Folsom Street dock during those four years, and I frequently saw the discharge of coal there. I am familiar with the division in the bunkers, the location of the off and inshore bunkers, and with the compartments of each bunker at Folsom street. Coal is discharged over the inshore bunkers. I have never

(Testimony of David G. Powers.)

seen coal discharged over any part of the offshore bunker. I used to see coal discharged into coal cars which [612—556] were afterward propelled over to the scales. The bottom of the coal cars is shaped like a pyramid or an inverted “V.” When they wished to empty the car they pulled a chain which opens the doors on both sides, and the coal drops down the slanting bottom. I am familiar with the chutes which open out from the bottom of the hoppers, and also with the chutes which protrude from the north side of each hopper. The cars would coal right underneath the hoppers or at the side of the hoppers at Folsom street—I have seen it both ways. I have seen the cars loading, but I have not been very close to them during the four years from 1904–1908 and when they were loading. The cars used to be overloaded and the coal would roll off and down into the inshore bunkers. I have seen that happen every time I was up there on the Folsom Street dock. I have been in the scales-house there. The man who is taking the weights looks west, with his back to the hoppers. Even if he turns and looks east he could not see very well the operation of loading the cars with coal. I do not believe he could see beyond the first hopper. During the four years, 1904 to 1908, I never saw coal being dropped directly from the hoppers to the pockets of the inshore bunker at Folsom Street, nor did I ever during that period see any coal being brought over the scales at a time when the Government weigher was not present; nor did I at any time between 1904 and 1908 have any conversa-

(Testimony of David G. Powers.)

tion with the defendant Mayer with regard to the discharge of coal upon the Folsom Street dock, and particularly with reference to coal that dropped off the sides of the car into the bunkers below. There was nothing to prevent the coal dropping from the sides of the car into the bunkers below except a board or two to walk along but that was about all; that will not stop it from falling down. I actually saw coal go down into the bunkers in that way.

During the years 1904 to 1908 I frequently visited the Mission street bunkers, more often indeed than the Folsom street bunkers. I used to see the defendant Mayer there all [613—557] the time. He was located in the scales-house weighing the incoming coal and checking it with the Government weigher. The rod which connects the bottom of the scales with the mechanism below the floor of the scales-house at Mission street was exposed for the entire distance between the table of the scales and the floor of the scales-house. Mr. Mayer used to sit right next to the rod, with his feet on the rod. I saw him put his feet up against that rod several times. He used to talk about it himself. He used to boast about how much money he was making and how he was robbing the Government and robbing these "lime juicers," as he used to refer to them, meaning the steamers that used to come there for the Western Fuel Company. Every time you would meet him he would tell you about how much he stole or what he was doing. On a number of occasions, at noon or at five o'clock, I used to see the chutes underneath the hoppers at Mis-

(Testimony of David G. Powers.)

sion street opened up so that the coal would run into the bunkers. At such times the Government weigher would be away eating his dinner, or if it occurred at night he would be at home. I never saw any Government inspectors on the dock at noon-time or after the men were laid off at night. I could not say how many times I saw that practice indulged in, but it occurred several times. It was another common occurrence at Mission Street to load up the car when the weigher had gone to lunch, pass over the scales with it, and at five or ten minutes to one empty such car into the bunkers, and then load it up again and have it ready for the weigher when he came back at one o'clock. Such carload of coal would not be weighed at all. The defendant Mayer certainly saw these operations to which I have just testified. During the four years, 1904 to 1908, the defendant Mills would be upon the docks but not upon [614—558] the bunkers when coal was dumped into the bunkers.

In 1908 I was sent to the Pacific Mail Steamship Company's dock by Mr. Mills to work for the Pacific Mail Steamship Company as a weigher. During the years 1904 to 1908, concerning which I have above testified, the Government weigher on the barges would, when the coal was not being actually weighed, ordinarily remained in the cabin smoking, or back of the engine-room, sitting down talking, he would keep away from the dust; he was afraid of getting dirty. Referring now again to my employment by the Pacific Mail Steamship Company, I remained in their employment about sixty days. I quit them in

(Testimony of David G. Powers.)

disgust. I supposed Mr. Chisholm was my superior. but I got my orders from Mr. Mills. Mr. Mills, in sending me over, told me to give the Western Fuel Company the best of it. In sending me over to the Pacific Mail Steamship Company, Mr. Mills told me that said company had informed him that they were receiving complaints from their engineers about the short-weighting of coal, and had requested that he send them a weigher to assist their own weigher, Mr. Park. I reported to Mr. Chisholm who testified here the other day. My duties during the sixty days of my employment with the Pacific Mail Steamship Company were checking coal with customs weighers on board the barges which were being discharged into the Pacific Mail steamers. I was paid by the Pacific Mail. As to what I observed, it was the same old racket all along; they were robbing the Pacific Mail. I saw the same thing the second day I was working for them. I went to Mr. Chisholm and complained and told him he was being robbed. In answer he tapped me on the back and said, "You are getting your pay, aren't you?" and I said "Yes." Then he said, "Well, go back and sit down and say nothing; keep your mouth shut." That occurred a few days after I started work. During those sixty days I sometimes worked at night, I think on one or two occasions. The Government weigher during those sixty days [615—559] would ordinarily be stationed in the cabin on the barge smoking, or sitting down back of the engine-house. Mr. Park represented the Pacific Mail Steamship Company on the

(Testimony of David G. Powers.)

barges. The Western Fuel Company was represented only by their hatch-tender, they didn't have a checker. I quit the Pacific Mail Steamship Company in disgust. I went to Mr. Donaldson and told him what was going on, and he said, "It runs against your grain to talk like that," and I told him that it ran against my grain to be a thief. Donaldson was the assistant superintendent of the Pacific Mail.

On leaving the Pacific Mail Steamship Company I was immediately employed by the Western Fuel Company. I was employed this time as a kind of an assistant—checking, weighing once in a while, attending the hatch on the barges, and running the engines. I continued in the employ of the Western Fuel Company this time until 1911, leaving on December 13, 1911, so that I was there practically the whole of that last year. I used to run the barge engine quite frequently. I was a plain hoist engine. I worked in this capacity on all the barges, except the "Melrose" and the "Wellington." I would spend only a day or two at a time on each barge. It was an occasional occurrence. I was also a hatch-tender for, I should judge, about a year or a year and a half at intervals. My duties as hatch-tender were to take charge of the gang of men and supervise the discharge of coal from barge into ship. I had nothing to do with the loading of the barges from the bunkers. While I was hatch-tender I would be in the vicinity of the hatchway, and the Government weigher would notify me when a weight was desired. Then Mr. Edward J. Smith would do

(Testimony of David G. Powers.)

all the talking. He was there with me. He was present practically the entire time that I was hatch-tender; in fact, I became hatch- [616—560] tender when he became weigher. Edward J. Smith was employed by the Western Fuel Company just about the time that I left the Pacific Mail Steamship Company. I do not think any one preceded him as weigher on the barges. When the Government weigher wanted a weight, he would communicate his desire to Mr. Smith. Smith would holler "On the scales." I could see the tubs of coal before they would be hoisted to the scales when a weight was desired and also the tubs to be hoisted when no weights were being taken. I could also see the shovelers down in the hold of the barge. When the tubs were coming up and being discharged into the steamer without being weighed they were about three-quarters full; but when they were being placed on the scales they would be heaping up, and this would occur in the presence of the defendant, E. J. Smith. When tubs were being weighed the shovelers would always put fine coal in and lumps; one man would throw lumps in and another man fine coal. They had just as good opportunity during this period after 1908 as they had during the period 1904 and 1908, to which I have previously testified, for doing that. It would take about 8 or 10 minutes to weigh a round of buckets. The maximum number of tubs per hour would be 120, but when they were finishing a bunker or a ship, the tubs would sometimes come up very slow. The minimum number of tubs would be 15 an

(Testimony of David G. Powers.)

hour. The average would be about 90 tubs an hour. Sometimes ships would be coaled out in the stream instead of at the dock. It was the rule always to clean the barges out before sending them back to get a new load, though it would several times happen that the barge would not in fact be cleaned out. When the barges were cleaned out Mr. Mills would figure up his books and his overs or his unders, which would [617—561] show on the books. I never made any entries in the books of the defendant Mills. My brother did. My brother was employed by the Western Fuel Company about four years, I believe, as assistant to the defendant Mills. He quit on July 1st, 1911, and at that time he had been working there since a time prior to 1908. I became assistant to defendant Mills after my brother left. Between the time that I left the employ of the Pacific Mail Steamship Company and the time I became assistant to the defendant Mills, I frequently visited the Folsom Street dock and the Mission Street dock. The latter dock was dismantled about December, 1912. I am not sure about the date. The Western Fuel Company was still using that dock when I quit. From 1908 until 1911 the Folsom Street dock was more frequently used for the discharge of foreign coal than any of the other docks. Mayer was more frequently at Folsom Street, but he was located at both docks. When I was assistant to defendant Mills I frequently attended to the coaling of the barges, and I often accompanied a barge over to Folsom Street dock for the purpose of taking on coal. I would get

(Testimony of David G. Powers.)

the weights of the coal from the weigher Mayer. I always cleaned a pocket out when we were loading a barge from the offshore bunkers. A barge would be charged exactly with the weight of the contents of the pockets. The weights would be given to Mr. Mills by the defendant Mayer. I sometimes acted as assistant to Mayer in loading coal into the barges at Folsom Street after I left the Pacific Mail Steamship Company. This was only occasionally to relieve Mr. Mayer when he was at Mission Street. Upon such occasions I would handle the discharge of the coal into the barges myself. I certainly would check off the weight of the coal discharged into the barges. We weighed the coal and kept track of every pocket. We weighed [618—562] the coal into the cars and kept track of the pockets and the train loads that were emptied into said pockets. All the pockets were numbered. Then engineer in charge of the train would get his orders as to what pocket to put the coal into from the weigher in the scale-house. At Mission Street they have 15 pockets, but I have forgotten the number at Folsom Street. The partitions in the bunkers extended right up to the track, so that every partition or pocket was completely separated from the others. During the period between the time when I left the Pacific Mail Steamship Company and December, 1911, when I left the Western Fuel Company, I frequently saw imported coal being discharged by way of hoppers or towers into cars. They would always load the cars up and let the coal run back into the inshore bunker. That was a fre-

(Testimony of David G. Powers.)

quent occurrence. The chutes through which the coal runs from hopper to car are operated by the men on the train by pulling a cord which would open the chute cover and let the coal run into the car. It was a common occurrence to see the chute thus opened and the coal permitted to run down the sides of the car into the bunkers. I never at Folsom Street (I have just been talking about Mission Street) saw the chutes open and the coal permitted to run into the bunkers below without being weighed during these years 1908 to 1911. A number of times they used to load a car up just before the weigher would go to lunch, that is, a few minutes before 12 o'clock, and run it over the scales and back again, and switch it back five minutes to one, dump it into the bunker, and then load it up again before the weigher returned. That occurred both at Folsom Street and at Mission street and was frequent.

I am familiar with the scales both at Mission Street and at Folsom Street. At Folsom Street the scale-house was [619—563] located on the westerly side of the dock, and the weigher faced in a westerly direction with his back toward the operations, whereas at Mission Street the scale-house was at the easterly end of the dock, and the weighers looked out toward the bay with their backs toward the operations. I recall the discharge of the "Dumbarden" and the "Germanicus" at Folsom Street. There was a considerable shortage in the discharge of the former. I had a conversation at Mission Street with the defendant Mayer concerning the scales before the discharge

(Testimony of David G. Powers.)

of the "Dumbarden." That conversation occurred coming down the back stairs that led into the engine-room or the fire-room. Mayer then told me that the scales would rest or be upheld by blocks or uprights underneath, so that they would not register the true weight. He told me he knew all about it. That conversation took place a few days before the discharge of the "Dumbarden." I never was under the scales myself. I was not present when one of the uprights was sawed off. That is the only conversation that I had with Mayer regarding the scales at Folsom Street. I had a conversation, however, with him regarding the link which was in use for the purpose of short-weighting coal. I have forgotten the date of the conversation, but I know that a man named Murray was then weighing coal for the Government. Murray made the blacksmith change the link and Mayer spoke about it and said, "Why, gee, we ain't doing a thing to these lime juicers and these other people (he meant the Government) with the bent link between the second and third cars." There were four cars to the train, and the link was between the second and third cars. Mayer told me how he was defrauding the Government with this link. I was present when the existence of the link was discovered. [620—564] Murray weighed a trainload of cars and was not satisfied with the result; so having weighed the train going one direction, he then switched it back and weighed it going the other direction, and the discrepancy in the weights was revealed. I did not see the link myself. Mayer told

(Testimony of David G. Powers.)

me that the link was bent in such a way that it would lift a certain amount of weight off the last two cars. He did not tell me how long the link had been in use. Billy removed it. I don't know whether they put it back or not. I didn't pay any particular attention to it, though I saw it being taken out.

I remember the vessel "Algoa." I believe she was loaded at Folsom No. 2 about 1909, but I am not sure of the date. She was being used as a store ship. She belongs to the Pacific Mail Steamship Company. They anchored her in Mission Bay when she was loaded. I do not remember that I assisted in the loading. I weighed the coal out of her in her discharge, and I think that was in the latter part of 1910. The hatches at that time were battened down. We had to remove the hatches and the canvas over them. The captain always ordered the hatches battened down after the boat had been loaded. My brother Eddie, who was assistant superintendent, was acting as superintendent at the time of the discharge of the "Algoa," because Mr. Mills was sick. I weighed out the coal that was discharged from the "Algoa." As I remember it, they loaded one barge first, and then they stopped for a while and later finished discharging the "Algoa" into the barges. A fire had occurred in the cargo, ignited by spontaneous combustion. The name of the captain was Lockart. They stuck a lot of pipe down in the coal, but no water was poured in, because there was no fresh water on the ship, and they did not want to use salt water because Mr. Mills claimed that it would take

(Testimony of David G. Powers.)

the strength out of the coal. [621—565] No water, therefore, was put upon this cargo. There must have been a shrinkage in the weight of the cargo due to the fire. I once knew what it was, but I do not recall it now. The coal that was taken out of the "Algoa" was loaded into Pacific Mail Steamship Company's vessels. The Government weigher and Mr. Park assisted in weighing the coal out of the barges into these vessels. I do not think the Western Fuel Company had a weigher present. My brother Ed kept a record of the discharge weights until Mr. Mills came back after his illness, and then he did it. I do not now recall the exact weight of the cargo as it was checked into these barges. I can say, however, that the cargo as checked into the Pacific Mail Steamship Company's vessels weighed more than when it was checked from the "Algoa" into the barges. The records kept by the defendant Mills will show the weights.

The men who trim coal know nothing at all about the weighing of coal.

The situation at night-time was much the same as that at daytime with reference to the discrepancy existing between the tubs that were and the tubs that were not weighed upon the barges. Sometimes the coal would come up three or four or five lumps in the tub. At other times the tubs would be three-quarters full or a little more full. A man would have to stand right over the hatch at night in order to see the contents of the tubs. As to lights, the Western Fuel Company owned about four or five lanterns, and the

(Testimony of David G. Powers.)

steamship company, I think, would produce one light, an electric light, which was located up high so that the engineer could see the bumper. Sometimes there would be two lights up at the bumper. The actual height of the bumper, and therefore of the lights, [622—566] would depend upon the height of the ship; so that sometimes you might be close down to the deck, and at other times 50 or 60 feet from the bottom of the barge. There were no lights other than those which I have mentioned, except a small lantern which Mr. Park used to use to look at the scale. The lanterns on the barges were ordinary coal oil and swinging lanterns, and were the only lights in the vicinity of the hatchway except the electric lights that I have mentioned. It would not be possible to see the amount of coal in the tubs at night except when the tubs were actually being weighed, unless a person were standing in the immediate vicinity of the hatchway. Sometimes it rained at night. The custom-house weigher would ordinarily stand near the boiler at night to keep warm or else in the cabin. Upon other occasions he would walk up and down the barge. The Government weigher would not station himself near the hatchway except when the tubs were actually being weighed.

The men in the hold of the barge would be distributed two to each bucket. There were eight men in all.

The defendant, Ed. Smith, acted as a weigher or checker when I was employed as hatch tender. I spoke to him about the overloading of the tubs that

(Testimony of David G. Powers.)

were weighed, and he said to me that he knew all about it; and I asked him why they didn't pay white men, or pay the other engineers of the Pacific Mail Steamship Company, and Mr. Smith told me they didn't have to pay them. He said that "the good fellows got a ton of coal, and Mr. J. B. Smith is a good friend of R. P. Schwerin, and he gets a check from J. B. Smith." I was asking him, you see, why the white engineers were not paid like the engineers on the Japanese lines. Ed Smith told me several times that his brother, J. B. Smith, and Schwerin were friends. He also spoke of the time that J. B. Smith and Schwerin went on the steamer "Bear" [623—567] or "Beaver" on the trial trip around the bay, the date of which I have forgotten. The defendant, Ed Smith, used to ask me to let him know from Mr. Mills' books how much the barges were overrunning, and I used to report the same to him.

When the defendant Mayer would leave Folsom Street to go to another wharf, I would take his place frequently at Folsom Street. I also sometimes took his place at Mission Street. Sometimes I would relieve him two or three days at a time. I would then be weighing coal. I would perform the same duties that he ordinarily performed. I many times had conversations with Mayer regarding the short weighing of coal imported into the United States.

I had a conversation with the defendant Mills regarding the overages that are set forth in his books. When I mentioned the overages to him he told me to keep my mouth shut, and that it was none of my business.

(Testimony of David G. Powers.)

On December 18, 1911, I watched the steamship "Korea" being coaled at Pier 44. Customs agents, John W. Smith and E. P. Enlow were with me. The "Korea" is a Pacific Mail Steamship Company liner. She was being coaled from the barge "Wellington." Mr. Edward J. Smith was upon the barge acting as weigher. Our visit to the "Korea" occurred about six o'clock. The coaling continued throughout the entire night. We stayed until the coaling for that night was completed. We were there all night, practically 12 hours. We located ourselves on the captain's bridge of the "Korea." Mr. Smith and the men on the barge could not see us. I guess that we were within 30 or 40 feet from the tubs; we were just about level with the electric lights at the bumper. We could by the aid of these lights see the quantity of coal contained in the tubs as they came up. The [624—568] tubs were coming up about 45 an hour. Three weights were taken that night and only three, that is, from six o'clock at night until six o'clock in the morning. When these weights were taken 12 buckets were weighed; that is to say, three rounds of four buckets to a round. When the tubs were being weighed they were overloaded, heaping full, and when they were not being weighed they went up very light. Sometimes, indeed, they had to send the tubs back to put more coal in them, because they did not contain enough coal to trip at the bumper. Neither Mr. Ed Smith nor any of the Western Fuel Company's officials knew that we were on the captain's bridge—not that I know of. I saw defendant Ed-

(Testimony of David G. Powers.)

ward J. Smith there the first part of the evening when they were taking the first weight, but I didn't see him afterwards. The Government weigher was out of sight—in the cabin. I and the two customs officials saw him go there. He was within proximity of the hatchway when the three weights that I mention were taken. Weights were taken when the command "On the scales" was given. The "Wellington" was equipped with platform scales. Two of the shovellers had to come up from the hold when the weights were taken. It took from eight to fifteen minutes to get the weights. After the first tub was weighed the remaining three tubs were still in the hold of the barge. In January, 1913, I witnessed the discharging of the "Americano" with two Government officials at Folsom Street dock No. 2. The "Americano" is now sunk, and I don't know whom she belonged to at that time that she was carrying coal for the Western Fuel Company. The Government weigher who was present taking the weights was Mr. Phelan. Mr. John W. Smith accompanied me on that occasion. He was a Government official. We stood around the dock from about half past eleven until about half past one o'clock. Mr. Phelan went for his lunch about five minutes to twelve o'clock, and he returned a few minutes after one. In his absence Mr. [625—569] Smith and I observed that at about five minutes to twelve four cars were loaded out of the hopper, run up to the scales, and then run back again and dumped without being weighed. I do not know who had charge of the cars.

(Testimony of David G. Powers.)

The weigher on the dock at that time was Mayer. He must have seen the incident that I have mentioned. He was present because I saw him come downstairs afterward. After being dumped those four cars were loaded up again under the hopper, and when Mr. Phelan came back from lunch the new load of coal was run up to the scales and weighed.

At the Howard and the Green street docks there is no scales-house, so the imported coal is tallied out and weighed. They are supposed to take one weight in every 15, but in practice they would take three or four weights a day and fill in the other weights and make averages. In the weighing out of this imported coal, the tubs that were to be weighed would be very light, and the tubs that were not to be weighed were full. The situation is just the reverse of that on the barges. The occurrence that I have described was frequent.

At Folsom street there were only a few boards under the hoppers, so that the coal would drop down below into the inshore bunkers. The chutes leading from the hoppers were opened or closed by the men in charge of the coal cars.

Cross-examination by Mr. STANLEY MOORE.

Mr. STANLEY MOORE.—Q. Mr. Powers, is it a fact that Mr. Tidwell has stated to you that if these defendants are convicted and are imprisoned and fined that you are to receive a portion of the fines?

A. No, sir.

Q. He has never made that statement to you?

A. No, sir. [626—570]

(Testimony of David G. Powers.)

Q. Has he ever said to you that he had recommended the bringing of a civil action upon the ground of fraud with respect to these matters?

A. No, sir.

Q. He never has made any such statement as that to you? A. No, sir.

Q. He never has stated then that he intended to bring an action for a penalty in double the value of the 62,000 tons of coal as to which it is claimed the overage is wrongful? A. No, sir.

Q. And that you would receive a proportion of that? A. No, sir.

Q. You never have stated to any one that Mr. Tidwell or anybody else has said to you that you would receive a percentage or a proportion of the fines or penalties that should be recovered?

A. No, sir—

Mr. ROCHE.—(Intg.) Just one minute. That question is objected to, may it please the Court, as too indefinite, and that no proper foundation is laid if the question is put for the purpose of impeachment.

The COURT.—The objection is overruled; it may not be put for the purpose of impeachment, he may admit it.

Mr. STANLEY MOORE.—Q. Now, Mr. Powers, have you seen the statement or heard of the statement that you were to receive a part of the fines or penalties recovered?

A. Yes, sir, I have read that statement.

Q. You have read that statement, have you?

(Testimony of David G. Powers.)

A. Yes, sir.

Q. Do you recall reading that statement in the "Bulletin," the "San Francisco Bulletin" of February 6th, 1913, at the time the subpoena was served upon the Western Fuel Company to produce its books? A. Yes, sir.

Q. And that statement was, in brief, was it not, that you would be rewarded by Uncle Sam with a percentage of any moneys that [627—571] may be recovered from the accused coal operators?

A. Yes, sir.

Q. You recall that, do you? A. Yes, sir.

Q. Do you remember yourself giving out a long interview to the "Examiner" on February 19, 1913, just about two weeks after the appearance of the "Bulletin" article? A. I do.

Q. You gave a pretty full account of what you said your testimony would be, did you not, in the course of that interview? A. I did.

Q. Did you state to the "Examiner" reporter to whom you gave that interview that you were to receive a large percentage of all moneys which through your work would be saved to the Government, and that if the indictments brought concerning the frauds were proved that you would receive a reward that would make you almost independent for life?

A. I did not.

Q. You did talk with the "Examiner" reporter on that day, did you not? A. I did, yes, sir.

Q. And you are acquainted with him?

Q. Yes, sir.

(Testimony of David G. Powers.)

Q. I want to ask you about this article in the "Bulletin" of February 6th, 1913; you were acquainted at that time with Mr. Masters and Mr. Gleason, the gentlemen who have been mentioned by Mr. Tidwell in connection with the "Bulletin"?

A. I never heard Mr. Tidwell's testimony so I don't know what you're talking about.

Q. Well, did you know at that time a Mr. Masters and a Mr. Gleason who were then employed on the "San Francisco Bulletin"? A. I did.

Q. And you had known them for some time before that, had you not?

A. No, sir—before what date, pardon me?

Q. Before February 6th, 1913?

A. Yes, sir, I did.

Q. How long prior to that time had you been acquainted with [628—572] them?

A. Oh, I should judge about perhaps eight months, or something like that.

Q. You had talked with Mr. Tidwell in their presence, had you not, on various occasions prior to that time? A. I had not.

Q. Do you recall that in this "Bulletin" article—and to refresh your recollection I will exhibit the article to you, and if you like you can just look at it, Mr. Powers—I say do you recall that in this "Bulletin" article a full account and in detail was contained there of what your testimony would be, going over these matters with respect to the weighing of the buckets, and the three-quarters full and the half full and so forth, that have been testified to here?

(Testimony of David G. Powers.)

A. Yes, sir, I made those statements.

Q. You made those statements, did you not?

A. To the paper.

Q. To the "Bulletin" representative at that time?

A. I did.

Q. This information, Mr. Powers, that is contained in this "Bulletin" article of February 6th, 1913, was given by you to the representative of that paper, was it not? A. It was.

Q. Mr. McNab did not give out that information to your knowledge, did he?

Mr. ROCHE.—Just one minute. That question is objected to upon the ground that it is not proper cross-examination and upon the ground that it is immaterial.

Mr. STANLEY MOORE.—Well, I am just trying to show, if your Honor please, that the witness, so far as that article is concerned, that he is the man who gave out the information and all the information contained therein.

Mr. ROCHE.—He just testified to that. [629—573]

The COURT.—Yes, he just said so.

Mr. STANLEY MOORE.—Very well then, your Honor.

Q. Now, I call your attention to these statements in this article, the information for which you testified you gave out, and all of which you gave out; you speak here about having charge of the barges and about the trouble that you got into, and the trouble affecting Robert Donaldson, and what you did in re-

(Testimony of David G. Powers.)

gard to that, which I will not take time to stop to go into now; and then after reference to opium, this article states: "Powers was then induced to turn over to United States District Attorney McNab the information concerning the big coal frauds which brought about the present Western Fuel Company scandal; he will be rewarded by Uncle Sam with a percentage of any moneys that may be recovered from the accused coal operators." Now, Mr. Powers, did you not in giving out the information that made up that article and in relating in detail as to what your testimony would be, did you not also state that as a reward for giving that information you expected to be rewarded by Uncle Sam, or the United States, with a percentage of the fines or penalties which might be recovered? A. I did not.

Mr. ROCHE.—Will you let me see that article please, Mr. Moore?

Mr. STANLEY MOORE.—Certainly, Mr. Roche, I will hand it to you.

Q. Now, Mr. Powers, I want to direct your attention to an article in the "San Francisco Examiner" of date—

Mr. ROCHE.—Of course, in fairness to the witness, Mr. Moore, you will concede that this "Bulletin" article does not purport upon its face, in so far as the matter which you read to the witness is concerned, to be a quotation from the witness? [630—574]

Mr. STANLEY MOORE.—Well, the article speaks for itself in that regard, Mr. Roche. It states

(Testimony of David G. Powers.)

the witness' attitude in this matter, his history of these transactions, and what his testimony was going to be. I thought it was conceded that he gave all the information which went to make up that article.

Mr. ROCHE.—Well, you have had experience enough with newspaper reporters, Mr. Moore, to know —

Mr. STANLEY MOORE.—Now, Mr. Roche, don't begin to argue the matter. We will get along with the proof a great deal faster if you do not argue, notwithstanding the fact that that statement appears in the newspapers over and over and over again.

Q. This article in the "Examiner," on February 19, 1913, is a very large article, containing among other things a picture of yourself?

A. I read the article.

Q. And it gives in almost as complete detail as you have given here in the last day or so the testimony—your testimony with respect to this case, does it not?

Mr. ROCHE.—That is objected to, may it please the Court, as calling for the contents of the printed article. If counsel wants to put the article in evidence let him put the article in evidence.

Mr. STANLEY MOORE.—I have no objection to the article being marked in connection with the testimony of the witness. I am examining him as to his state of mind.

Q. You gave out the material that made up that article, did you not? A. I did.

Mr. ROCHE.—What is the date of that article, Mr. Moore? [631—575]

(Testimony of David G. Powers.)

Mr. STANLEY MOORE.—It is February 20th; the conversation was on February 19th, but the paper came out on the morning of February 20th.

Q. Mr. Powers, I call your attention to this part of the article: “It was through this man, David George Powers, now in the Government employ as a Special Agent, that the evidence for the indictment was brought to the Grand Jury. The present exposè has come about purely in the line of Powers’ regular duties. He did not instigate the investigation as a means of revenge. Powers receives a large percentage of all moneys which through his work are saved to the Government. If the indictments are brought home and the frauds proved Powers will receive a reward that will make him almost independent for life.” Now, Mr. Powers, calling your attention to that part of the article, I ask you if it is not the fact that you stated those matters to the “Examiner” reporter, that you were then a Special Agent, that you did not instigate this investigation as a matter of revenge but purely in the line of your duties, and that if the frauds were proved and convictions resulted that you expected enough of money by way of a proportion of the fines, to make you almost independent for life?

A. I have stated everything, but I did not state to the “Examiner” that I expected a reward that would make me independent for life, or any other reward.

Q. That is an answer to the question. Did you ever hear, Mr. Powers, that Mr. Tidwell had stated

(Testimony of David G. Powers.)

that if these defendant were convicted and fines and imprisonments imposed, did you ever hear that he had stated to any one that you would receive a proportion of the fines? A. No, sir. [632—576]

Q. Did you ever read anything in the "Bulletin" to that effect? A. Not that I remember of.

Q. Do you remember reading an article in the "Bulletin" at or about the 1st day of August of this year, 1913?

A. About what,—about this case?

Q. Yes, about your interest in the case?

A. No, sir. I may have read it, but I have forgotten. You might let me look at it, won't you?

Q. In that article, Mr. Powers, an interview was given by Mr. Tidwell, was there not?

A. I don't know anything about the article; why don't you show it to me?

Q. I have the article and I thought it was here; perhaps I can find it in a moment.

Mr. ROCHE.—What article are you referring to now?

Mr. STANLEY MOORE.—An article of date, August 1st,

Q. You remember, do you not, at a time when you thought Mr. Tidwell was going to discontinue you as a Special Agent; you remember that time, do you not?

A. You better show me the article and then I will remember it better.

Q. I am asking you if you remember the time. I will withdraw that. You were made a Special

(Testimony of David G. Powers.)

Agent temporarily by Mr. Tidwell a number of times, were you not? A. I was.

Q. When were you first put on as a Special Agent for the Government at the recommendation of Mr. Tidwell? A. Sometime during 1913.

Q. Sometime during 1913; can you be more definite in your answer with respect to that than by answering sometime during 1913?

A. I don't know the exact date.

Q. No, I am not asking you for the exact date, Mr. Powers, but [633—577] approximately when was it, please, in 1913, that you became a Special Agent?

A. Oh, it was back in—it was in 1912 rather, back around August, I believe.

Q. Oh, it was not sometime in 1913, according to your present recollection, but it was back in 1912 and around August, you believe? A. Yes, sir.

Q. For what length of time would you be appointed in each instance upon the recommendation of Mr. Tidwell? A. Ninety days.

Q. It was a temporary appointment as Special Agent for 90 days which could be had upon his recommendation, was it not? A. Yes, sir.

Q. Do you remember a time when you heard that Mr. Tidwell had received some kind of word or instruction that that should not go on any longer?

A. Yes, sir.

Q. When was that?

A. I have forgotten the exact date.

Q. You have forgotten that date?

(Testimony of David G. Powers.)

A. You ought to know, you have the clipping there in front of you, haven't you?

Q. No; but I am asking you about when that was, irrespective of any clipping.

Mr. ROCHE.—That was sometime, Mr. Moore, in—

Mr. STANLEY MOORE.—Now, never mind, Mr. Roche,—I want to examine the witness.

A. I believe it was about July or sometime around there, 1913.

Q. You think it was about July, 1913?

A. Before that, perhaps in June. I am not sure.

Q. You made some aspersions or charges against Mr. Tidwell at that time, did you not?

A. I made a statement.

Q. Yes, when you understood that the job was not going to last any longer you said something that was a little derogatory to your chief, didn't you? [634—578]

A. No, sir, not because the job was not going to last any longer.

Q. All right; you say you thought he was very well pleased when people had not been able to find anything in this case against the Western Fuel, didn't you?

A. I said that Mr. Tidwell sent two men down there, or three men down there, from his office to weigh coal, and to look out for everything, and when their backs were turned to the scales and to the bunkers they couldn't see anything and they went back and reported they had not seen anything.

(Testimony of David G. Powers.)

Q. And didn't you say that when Mr. Tidwell had sent to the Special Agents down there and they came back to Mr. Tidwell and reported they had not seen anything, or saw anything, that Mr. Tidwell seemed very well pleased?

Mr. ROCHE.—That question is objected to, may it please the Court, upon the ground that it is not proper cross-examination, and upon the further ground that it is immaterial.

Mr. STANLEY MOORE.—I will withdraw it at this time.

Q. Referring to this "Bulletin" article of August 1st, 1913, at the time you understood the Special Agent job was not going to last, you made a statement to the newspapers at that time, did you not?

A. You bet I did.

Q. Yes, you were heard from; and Mr. Tidwell—he made a statement too, did he not? A. He did.

Mr. ROCHE.—Just a minute. That is objected to, if your Honor please, as calling for the conclusion of the witness. We have Mr. Tidwell's testimony upon that subject.

Mr. STANLEY MOORE.—Very well.

Q. Then the "Bulletin" purported to quote according to your recollection a statement as coming from Tidwell, did it not? A. I don't know. [635—579]

Mr. ROCHE.—Wait a moment. That is objected to, if your Honor please, upon the same grounds.

The COURT.—The objection is sustained.

(Testimony of David G. Powers.)

Mr. ROCHE.—Let us try this case fairly, Mr. Moore.

Mr. STANLEY MOORE.—Well, Mr. Roche, that is very good advice; and if we do that you should not try and suggest to your witness and have him testify that we had an overage of 50 or 60 per cent, and that percentage assumed by you in every question you ask the witness thereafter, until it is actually shown by us that it is reduced to a very small percentage, and then you interrupt us when the witness is turned over for cross-examination. I am glad that you speak about trying the case fairly, because that is the way a Government representative ought to try a case.

Mr. ROCHE.—And that is the way the Government representative is trying the case.

Mr. STANLEY MOORE.—Well, that is a matter of opinion, Mr. Roche, which we are ready to leave to this jury.

Q. Now, answer the question, Mr. Powers?

A. I made those statements; yes, sir.

Q. You read that statement, didn't you?

A. Yes.

Q. I am referring you now to what purports to have been a statement or some statements made in the paper by Mr. Tidwell. Did you also read that?

A. Oh, I didn't pay any attention to that; I don't know what Mr. Tidwell said from what the papers said; I only know what I said and what I told the papers. I cannot testify to what Mr. Tidwell said.

Q. I am asking you now because Mr. Roche

(Testimony of David G. Powers.)

thought that in fairness to you I should exhibit the article to you.

Mr. ROCHE.—No, that was not my suggestion at all. [636—580] My suggestion was that you were asking the witness to testify to something concerning which you claim Mr. Tidwell made a statement about.

Mr. STANLEY MOORE.—Yes, and as to whether he read that in the “Bulletin.”

A. I don't know what Mr. Tidwell said.

Q. I want you to read the part of the article I now indicate to you, being the lower part of that first column (handing). The portion just directed to the attention of the witness, for the purpose of the record, reads—

Mr. ROCHE.—(Intg.) Now, just a moment, Mr. Moore. Your Honor please, counsel has no right to read this.

The COURT.—What is the purpose of this, Mr. Moore?

Mr. STANLEY MOORE.—I want to show that he has read it, that it was an interview by himself, and that he read that part of it in relation to what Mr. Tidwell said. I want to bring home to him that the statement was made repeatedly by Mr. Tidwell that he would get a part of the fines that would result from a prosecution here.

Mr. ROCHE.—Your Honor can readily see the method pursued by counsel: Mr. Tidwell is put upon the stand and upon cross-examination he is asked whether he did not make certain statements to re-

(Testimony of David G. Powers.)

porters, and that statement is positively denied by Mr. Tidwell. Instead of producing the men to whom counsel claims Mr. Tidwell made this statement, because they cannot be produced—

Mr. STANLEY MOORE.—Mr. Roche, we will produce half a dozen of them.

Mr. ROCHE.—Just a moment. I know what you can and what you cannot do. I say you cannot produce them. [637—581]

Mr. STANLEY MOORE.—We will produce them.

Mr. ROCHE.—Counsel is endeavoring to ring into this case through a newspaper article some statement that he claims or asserts Mr. Tidwell made. I submit that that is not the proper way of trying to get that testimony into this record.

Mr. STANLEY MOORE.—Here is the proposition, your Honor, and this is what I am endeavoring to do. He disclaims that Mr. Tidwell ever personally made that statement to him. Now, he has gone farther than that and says that he never has heard that Mr. Tidwell made any such statement as that, never heard anything of that kind attributed to Mr. Tidwell. I want to lay a foundation all along the line with respect to the testimony of this witness concerning that subject matter for the purpose of impeachment, and we will impeach him very fast when the proper time comes in that regard and in very numerous quarters. I contend that I am entitled to direct his attention to this statement appearing in the "Bulletin," which I claim appears

(Testimony of David G. Powers.)

there in connection with the statements made to the "Bulletin" by Mr. Tidwell and with respect to the statements and interviews given to the "Bulletin" by Mr. Tidwell, and to ask him if he did not read it, and if it does not contain the statement again that he is to get a percentage of the moneys.

Mr. ROCHE.—Now, your Honor will observe what counsel is still persisting in doing; he is still reiterating, in the presence of the jury, that he intends to direct the witness' attention to statements made by Mr. Tidwell to the "Bulletin," statements which in fact Mr. Tidwell never made and which counsel knows he never made and— [638—582]

Mr. STANLEY MOORE.—No, I don't know that he never made them. And I object to that as misconduct, if your Honor please. I know that we are going to prove that Mr. Tidwell made the statement to the witness over and over again, and I don't believe Mr. Tidwell himself is going to deny it.

Mr. ROCHE.—If counsel claim that Mr. Tidwell made any statement to any newspaper reporter, at any time or under any circumstances or at any place, before he has a right to assume and state in the presence of the jury that the statement was made he ought to substantiate it by proof; and he cannot assume in a question put to him to this witness that Mr. Tidwell made any statement which first is not established to have been made by him, particularly in the teeth of his denial.

Mr. STANLEY MOORE.—Mr. David G. Powers is under cross-examination now and not Mr. Tidwell.

(Testimony of David G. Powers.)

When Mr. Tidwell was under cross-examination I did attempt to examine him with reference to these newspaper articles, and I was not permitted to do it because of an objection made. Now I claim, whether it appeared in the "Bulletin" or whether it appeared in the "Examiner" or whether it appeared anywhere else, I claim I have the right to examine this witness whether in any manner or from any source it ever came to his ears or to his knowledge that the statement was being made here by the special agent that he would be financially rewarded as a result of the successful prosecution of these cases. It does not make any difference, for the purpose of this question, whether it was in the "Bulletin" or where it was.

The COURT.—Yes, that is true, but the only difficulty about your question that I see is the assumption that Mr. Tidwell made the statement. If you base your question on the [639—583] statement that it appears from the paper as though Mr. Tidwell had made the statement, and not base it on the fact that Mr. Tidwell made the statement I see no objection to that, and that only for the purpose of showing whether or not it had ever been brought home to this witness, the possibility of receiving any reward in case of the successful prosecution of these cases.

Mr. STANLEY MOORE.—That is the purpose of the examination, your Honor.

Mr. ROCHE.—Of course, we have not any objection to that kind of an examination being pursued,

(Testimony of David G. Powers.)

but counsel was not pursuing that kind of an examination when I made the objection.

Mr. STANLEY MOORE.—Q. Mr. Powers, did you read the whole of this “Bulletin” article?

A. I just read it now, yes.

Q. Do you mean to be understood as testifying here that you did not read it at the time the article appeared, or at least that portion of it to which just now I called your attention?

A. Well, I would not swear that I read the whole article, no.

Q. You gave a statement to the newspaper in the course of that article, did you not?

A. In the course of that article—I spoke to the newspapers, any statement that ever appeared in the newspapers from me I made, anything that ever came out.

Q. Mr. Powers, you were casting aspersions, or you were at outs temporarily at least, or disaffected by reason of this news that you received concerning your position?

Mr. ROCHE.—Now, just one minute—

A. (Intg.) No, not at all.

Mr. ROCHE.—All right, let it go. [640—584]

Mr. STANLEY MOORE.—Q. You read an article in which you said something about Mr. Tidwell, did you not?

A. You read the article,—read the article to the jury.

Q. I am asking you, Mr. Powers, whether that is correct, or not? A. Read the article, please.

(Testimony of David G. Powers.)

The COURT.—The article speaks for itself, I suppose.

Mr. STANLEY MOORE.—Yes, your Honor; that is true. The article does speak for itself, but can't he state whether he did or whether he did not?

The COURT.—He says he gave out whatever is contained in the article as purports to come from him.

Mr. STANLEY MOORE.—If that portion of the article speaks for itself I would like to read the rest of the article relating to Mr. Tidwell.

Mr. ROCHE.—That is just the difficulty about this matter, if your Honor please. Counsel is trying to ring in here something that Mr. Tidwell is alleged to have said. He has a right to impeach Mr. Tidwell if he can impeach him by putting a reporter on the stand to whom he made that statement, but he has no right to impeach him by introducing in evidence here a newspaper article which did not emanate from him.

Mr. STANLEY MOORE.—I am examining the witness concerning his state of mind, if your Honor please.

The COURT.—I know that, Mr. Moore, and I have suggested what you could do.

Mr. STANLEY MOORE.—Q. Mr. Powers, is it not a fact that you understood you read the whole of that "Bulletin" article?

A. I just answered you that I would not swear I read the whole article.

Q. Have you any recollection of reading the part

(Testimony of David G. Powers.)

and parcel of [641—585] it to which I have just referred you, relating to Mr. Tidwell?

A. No, I would not swear to that.

Q. Do you state here and testify that you did not read that part of it?

A. I may have I said; I would not swear to it unless I was sure of it.

Q. Do you repeat now, Mr. Powers, that neither Mr. Tidwell nor anybody else has ever told you at any time that in the event that these defendants were convicted and imprisoned and fined that you would receive a portion of the fine?

A. Mr. Tidwell told me nothing of the kind.

Q. Well, did anybody else tell you that?

A. Not that I remember.

Q. Do you mean to say that you cannot now recall as to whether they did or did not?

Mr. ROCHE.—Just a moment. That question has been asked and answered already, if your Honor please.

Mr. STANLEY MOORE.—I can test his recollection in regard to that, your Honor, and I want to know whether he testified positively.

The COURT.—The objection is overruled.

A. Yes, I cannot recall.

Mr. STANLEY MOORE.—Q. Do you mean to testify, Mr. Powers, that you don't remember either one way or the other as to whether some one else may have told you that? A. I don't remember.

Q. Has any one told you that there are United States statutes which apply to such cases as this, and

(Testimony of David G. Powers.)

which give to the informer a percentage of the fines?

A. Yes, sir.

Q. Who told you that?

A. Oh, I have forgotten the party's name. [642—
586]

Q. You have forgotten the party's name?

A. Yes.

Q. Did the party tell you what proportion of the fines the informer would be entitled to in such cases?

A. I have forgotten.

Q. You have forgotten whether he told you the percentage or proportion of the fine that the informer would be entitled to in such cases?

A. Yes, sir.

Q. Did he not tell you that that would be on the recommendation of the chief special agent, approved by the Secretary of the Treasury, and generally speaking was a moiety which amounted to one-half? A. No, sir.

Q. Where was this party at the time you had this conversation with him? A. I don't remember.

Q. When was it that you had this conversation?

A. I don't remember.

Q. You don't remember that?

A. I have forgotten the date.

Q. About how long might it have been?

A. Do you want me to tell you something I don't remember?

Q. I am asking you, Mr. Powers, do you mean to be understood as testifying before this Court and jury, and as wanting to testify that you have no

(Testimony of David G. Powers.)

recollection either in regard to the time or the place or the person with whom you had that conversation?

A. I forget.

Q. Well, can you state at this time whether or not there was more than one conversation in which that statute and that matter was mentioned in your presence and hearing? A. I don't remember.

Q. Can you recall at this time whether or not there was more than one person who mentioned that statute and matter to you?

A. I forget now. [643—587]

Q. Well, now, Mr. Powers, have you ever stated to anyone that you did expect to receive a large amount of money from the United States Government as a result of the information you had furnished in this case? A. I don't remember.

Q. Mr. Powers, don't you know that you have made that statement?

A. Didn't I just tell you that I didn't remember.

Q. I ask you, don't you know, Mr. Powers, that you have made that statement?

A. Didn't I answer that I don't remember?

Q. Answer the question yes or no.

A. I just told you I didn't remember.

Q. Can't you answer that question and tell me yes or no? A. I told you I didn't remember.

Q. That is all the answer that you will make?

A. That is sufficient, isn't it?

Q. Well, I am not arguing that with you, but can you answer any more definitely than that?

A. No, sir.

(Testimony of David G. Powers.)

Q. Have you ever said to anyone that you expected to receive from the Government \$40,000 as the result of your information in this case? A. No, sir.

Q. Have you ever made that statement to the father of your wife? A. Certainly not.

Q. Have you ever told anyone that you expected to receive from \$40,000 to \$60,000, as the result of the information that you gave in this case?

A. No, sir.

Q. Now, Mr. Powers, in the conversations that you had with these people whose names you don't remember, at places that you don't remember and at times that you don't remember, was anything said in regard to the informer's share of the fines in proceedings other than and in addition to criminal proceedings? A. I don't remember. [644—588]

Q. Well, was it not said in those conversations that Mr. Tidwell had made a recommendation that a civil suit be brought looking to the recovery as a penalty, or twice the value at \$6 or \$7.00 a ton, whichever it might be, on these 62,000 tons of coal?

A. I answered that before, no.

Q. It was not said then? A. No.

Mr. ROCHE.—How could Mr. Tidwell bring an action of that kind, Mr. Moore?

Mr. STANLEY MOORE.—I said recommend its being brought. The United States would bring the suit.

Mr. ROCHE.—Don't you know that the United States could not bring any such action?

Mr. STANLEY MOORE.—Haven't you seen the

(Testimony of David G. Powers.)

sections covering that matter?

Mr. ROCHE.—I have seen them, yes, but I say that an action of that kind cannot be brought.

Mr. STANLEY MOORE.—The law is, if your Honor please, although I was questioning the witness—

The COURT.—Let us try the facts of the case; the Court will attend to the law as best it can.

Mr. STANLEY MOORE.—Well, we can discuss the matter with Mr. Roche, if he wants to do it, and we can give him the law in the matter, although we prefer to stick to the cross-examination of the witness at this time.

The COURT.—The Court would much prefer it, too.

Mr. STANLEY MOORE.—Q. Do you remember whether anything was said in these conversations concerning the subject of civil actions and the fines and penalties occurring as a result of that, as well as the criminal action and the proportion of fines with respect to it? [645—589]

A. What are you doing? Trying to kid me. You have asked me the question a dozen times in different ways.

Q. The conversation that you remember was in regard to criminal actions, was it not?

A. I don't understand you.

Q. You understand, do you not, Mr. Powers, that there are two classes of actions; there are criminal cases, as the result of which people are liable to be sent to jail and fined.

(Testimony of David G. Powers.)

A. I am not an attorney, I don't know what you are getting at.

Q. I understand that, but I was just trying to find out from you whether you did understand that there were two kinds of cases; one kind in which people were liable to be sent to jail and fines imposed in addition thereto, and the other which was for the recovery of money merely in the way of fines and there was no question of going to jail involved?

A. I am not an attorney, I don't understand anything about it.

Q. I understand that, but don't you know, generally speaking, that there are those two kinds of cases or law suits?

A. I don't know anything about them other than what I have seen or heard, and I have heard very little.

Q. Then you don't know that, Mr. Powers?

A. No.

Q. You were appointed special agent back in 1912, and according to your recollection in the month of August of that year; is that right? A. Yes, sir.

Q. How long did you continue in your position as special agent by means of these 90-days' appointments made one after the other?

A. I believe I left the Government service sometime in 1913, in July, or August rather; sometime around there.

Q. Then it was sometime in July or August, 1913, and if it commenced sometime in August, 1912, then it was approximately [646—590] a year that, by

(Testimony of David G. Powers.)

the recommendation of Mr. Tidwell, you were special agent to the Government? A. Yes, sir.

Q. What have you been doing since that time, Mr. Powers?

A. Since I left the Government employ you mean?

Q. Yes. A. I have been working at painting.

Q. Doing what? A. Painting.

Q. Were you ever working for any other detective agency? A. No, sir.

Mr. ROCHE.—Mr. Moore, if you will permit me to correct you, he was not a special agent, he was a customs agent.

Mr. STANLEY MOORE.—He was a customs agent?

Mr. ROCHE.—Yes, a customs agent.

Mr. STANLEY MOORE.—Q. What did you understand your position was, Mr. Powers?

A. To get a lot of work for you fellows, and put these fellows where they belong.

Q. What did you understand the position was, the name of the position? A. Customs agent.

Q. Customs agent? A. Yes, sir.

Q. And did you work down at the custom-house?

A. Yes, sir, that is, I was on the outside.

Q. You were under Mr. Tidwell at that time, were you not? A. Yes, sir.